Global Arbitration Review

The Guide to Challenging and Enforcing Arbitration Awards

General Editor
J William Rowley QC

Editors
Emmanuel Gaillard, Gordon E Kaiser and Benjamin Siino

Second Edition

The Guide to Challenging and Enforcing Arbitration Awards

Second Edition

General Editor
J William Rowley QC

Editors
Emmanuel Gaillard, Gordon E Kaiser
and Benjamin Siino

Reproduced with permission from Law Business Research Ltd
This article was first published in May 2021
For further information please contact Natalie.Clarke@lbresearch.com

Publisher
David Samuels

Account Managers
Marta Jurkowska and Samuel Romp

Editorial Coordinator
Georgia Goldberg

Production Operations Director
Adam Myers

Head of Content Production
Simon Busby

Copy-editor
Caroline Fewkes

Proofreaders
Felicia Rosas and Martin Roach

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK

www.globalarbitrationreview.com

ISBN 978-1-83862-575-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAN VINGE KB

ALSTON & BIRD LLP

BGP LITIGATION

CARMIGNIANI PÉREZ ABOGADOS

CECIL ABRAHAM & PARTNERS

CLEARY GOTTLIEB STEEN & HAMILTON LLP

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP

DEBEVOISE & PLIMPTON

DE BRAUW BLACKSTONE WESTBROEK

DLA PIPER

ENERGY ARBITRATION LLP • TORONTO • WASHINGTON

FIELDFISHER LLP

FRESHFIELDS BRUCKHAUS DERINGER LLP

FRORIEP LEGAL SA

GAILLARD BANIFATEMI SHELBAYA DISPUTES

G ELIAS & CO

GIBSON, DUNN & CRUTCHER UK LLP

GOWLINGS WLG

HAN KUN LAW OFFICES

HORIZONS & CO LAW FIRM

JENNER & BLOCK LONDON LLP

KHAITAN & CO

KING & SPALDING INTERNATIONAL LLP

KONRAD PARTNERS

LITREDI, SC

LOYENS & LOEFF

MARTINEZ DE HOZ & RUEDA

MILBANK LLP

NAGASHIMA OHNO & TSUNEMATSU

NORTON ROSE FULBRIGHT LLP

REED SMITH

RESOURCE LAW LLC

SERGIO BERMUDES ADVOGADOS

STIRNIMANN FUENTES DISPUTE RESOLUTION

STUDIO LEGALE ARBLIT

TWENTY ESSEX CHAMBERS

YOUSSEF & PARTNERS

YULCHON LLC

Publisher's Note

Global Arbitration Review is delighted to publish this new edition of *The Guide to Challenging and Enforcing Arbitration Awards*.

For those new to Global Arbitration Review, we are the online home for international arbitration specialists, telling them everything they need to know about all the developments that matter. We provide daily news and analysis, and more in-depth books and reviews. We also organise conferences and build work-flow tools. Visit us at www.globalarbitrationreview.com.

As the unofficial 'official journal' of international arbitration, sometimes we spot gaps in the literature earlier than others. Recently, as J William Rowley QC observes in his excellent preface, it became obvious that the time spent on post-award matters had increased vastly compared with, say, 10 years ago, and it was high time someone published a reference work focused on this phase.

The Guide to Challenging and Enforcing Arbitration Awards is that book. It is a practical know-how text covering both sides of the coin – challenging and enforcing – first at thematic level, and then country by country. We are delighted to have worked with so many leading firms and individuals to produce it.

If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, M&A and mining disputes – and soon evidence and investor-state disputes – in the same unique, practical way. We also have books on advocacy in international arbitration and the assessment of damages.

My thanks to the original group of editors for their vision and energy in pursuing this project and to our authors and my colleagues in production for achieving such a polished work.

Alas, as we were about to go to press, we were stunned by the unexpected demise of one of those editors, Emmanuel Gaillard. This news was as big a shock as I can recall. Emmanuel was one of three or four names who define international arbitration in the modern era. It was a delight to know him, and a source of huge satisfaction that he respected GAR, and it is hard to imagine professional life without him. Our sympathies go to his family and beloved colleagues, who I have no doubt will keep at least some of the magic alive.

David Samuels

London
April 2021

Contents

Preface

During the past two decades, the explosive and continuous growth in cross-border trade and investments that began after World War II has jet-propelled the growth of international arbitration. Today, arbitration (whether *ad hoc* or institutional) is the universal first choice over transnational litigation for the resolution of cross-border business disputes.

Why parties choose arbitration for international disputes

During the same period, forests have been destroyed to print the thousands of papers, pamphlets, scholarly treatises and texts that have analysed every aspect of arbitration as a dispute resolution tool. The eight or 10 reasons usually given for why arbitration is the best way to resolve cross-border disputes have remained pretty constant, but their comparative rankings have changed somewhat. At present, two reasons probably outweigh all others.

The first must be the widespread disinclination of those doing business internationally to entrust the resolution of prospective disputes to the national court systems of their foreign counterparties. This unwillingness to trust foreign courts (whether based on knowledge or simply uncertainty as to whether the counterparty's court system is worthy – in other words, efficient, experienced and impartial – leaves international arbitration as the only realistic alternative, assuming the parties have equal bargaining power.

The second is that, unlike court judgments, arbitral awards benefit from a series of international treaties that provide robust and effective means of enforcement. Unquestionably, the most important of these is the 1958 New York Convention, which enables the straightforward enforcement of arbitral awards in 166 countries (at the time of writing). When enforcement against a sovereign state is at issue, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1966 requires that ICSID awards are to be treated as final judgments of the courts of the relevant contracting state, of which there are currently 163.

Awards used to be honoured

International corporate counsel who responded to the 2008 Queen Mary/PricewaterhouseCoopers Survey on Corporate Attitudes and Practices in Relation to Investment Arbitration (the 2008 Queen Mary Survey) reported positive outcomes on the use of international arbitration to resolve disputes. A very high percentage (84 per cent) indicated that, in more than 76 per cent of arbitration proceedings, the non-prevailing party voluntarily complied with the arbitral award. Where enforcement was required, 57 per cent said that it took less than a year for awards to be recognised and enforced, 44 per cent received the full value of the award and 84 per cent received more than three-quarters of the award. Of those who experienced problems in enforcement, most described them as complications rather than insurmountable difficulties. The survey results amounted to a stunning endorsement of international arbitration for the resolution of cross-border disputes.

Is the situation changing?

As an arbitrator, my job is done with the delivery of a timely and enforceable award. When the award is issued, my attention invariably turns to other cases, rather than to whether the award produces results. The question of enforcing the award (or challenging it) is for others. This has meant that, until relatively recently, I have not given much thought to whether the recipient of an award would be as sanguine today about its enforceability and payment as those who responded to the 2008 Queen Mary Survey.

My interest in the question of whether international business disputes are still being resolved effectively by the delivery of an award perked up a few years ago. This was a result of the frequency of media reports – pretty well daily – of awards being challenged (either on appeal or by applications to vacate) and of prevailing parties being required to bring enforcement proceedings (often in multiple jurisdictions).

Increasing press reports of awards under attack

During 2020, *Global Arbitration Review*'s daily news reports contained hundreds of headlines that suggest that a repeat of the 2008 Queen Mary Survey today could well lead to a significantly different view as to the state of voluntary compliance with awards or the need to seek enforcement. Indeed, in the first three months of 2021, there has not been a day when the news reports have not headlined the attack on, survival of, or a successful or failed attempt to enforce an arbitral award.

A sprinkling of recent headlines on the subject are illustrative:

- Uganda fails to knock out rail-claim award
- Iranian state entity fails to overturn billion-euro award
- US Supreme Court rejects Petrobras bribery appeal
- Spanish court sets high bar for award scrutiny
- Swiss award against Glencore upheld on third attempt
- Tajik state airline escapes Lithuanian award
- Dutch court refuses to stay Yukos awards
- Undisclosed expert ties prove fatal to ICSID award
- Brazilian airline's award enforced in Cayman Islands
- ICC arbitrators targeted in Kenyan mobile dispute

Regrettably, no source of reliable data is available as yet to test the question of whether challenges to awards are on the increase or the ease of enforcement has changed materially since 2008. However, given the importance of the subject (without effective enforcement, there really is no effective resolution) and my anecdote-based perception of increasing concerns, in summer 2017, I raised the possibility of doing a book on the subject with David Samuels (Global Arbitration Review's publisher). Ultimately, we became convinced that a practical, 'know-how' text that covered both sides of the coin – challenges and enforcement – would be a useful addition to the bookshelves of those who more frequently than in the past may have to deal with challenges to, and enforcement of, international arbitration awards. Being well equipped (and up to date) on how to deal with a client's post-award options is essential for counsel in today's increasingly disputatious environment.

David and I were obviously delighted when Emmanuel Gaillard and Gordon Kaiser agreed to become partners in the project. It was a dreadful shock to learn of Emmanuel's sudden death in early April. Emmanuel was an arbitration visionary. He was one of the first to recognise the revolutionary changes that were taking place in the world of international arbitration in the 1990s and the early years of the new century. From a tiny group defined principally by academic antiquity, we had become a thriving, multicultural global community, drawn from the youngest associate to the foremost practitioner. Emmanuel will be remembered for the enormous contribution he made to that remarkable evolution.

Editorial approach

As editors, we have not approached our work with a particular view on whether parties are currently making inappropriate use of mechanisms to challenge or resist the enforcement of awards. Any consideration of that question should be made against an understanding that not every tribunal delivers a flawless award. As Pierre Lalive said almost 40 years ago:

> *an arbitral award is not always worthy of being respected and enforced; in consequence, appeals against awards [where permitted] or the refusal of enforcement can, in certain cases, be justified both in the general interest and in that of a better quality of arbitration.*

Nevertheless, the 2008 Queen Mary Survey, and the statistics kept by a number of the leading arbitral institutions, suggest that the great majority of awards come to conclusions that should normally be upheld and enforced.

Structure of the guide

This guide begins with a particularly welcome and inciteful foreword by Alan Redfern, recognised worldwide as one of the most thoughtful and experienced practitioners in our field. The guide is then structured to include, in Part I, coverage of general issues that will always need to be considered by parties, wherever situate, when faced with the need to enforce or to challenge an award. In this second edition, the 14 chapters in Part I deal with subjects that include initial strategic considerations in relation to prospective proceedings; how best to achieve an enforceable award; challenges generally and a variety of specific types of challenges; enforcement generally and enforcement against sovereigns; enforcement of interim measures; how to prevent asset stripping; grounds to refuse enforcement; and the special case of ICSID awards.

Part II of the guide is designed to provide answers to more specific questions that practitioners will need to consider when reaching decisions concerning the use (or avoidance) of a particular national jurisdiction – whether this concerns the choice of that jurisdiction as a seat of an arbitration, as a physical venue for the hearing, as a place for enforcement, or as a place in which to challenge an award. This edition includes reports on 26 national jurisdictions. The author, or authors, of each chapter have been asked to address the same 51 questions. All relate to essential, practical information about the local approach and requirements relating to challenging or seeking to enforce awards. Obviously, the answers to a common set of questions will provide readers with a straightforward way in which to assess the comparative advantages and disadvantages of competing jurisdictions.

With this approach, we have tried to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by parties who find that they will need to take steps to enforce these awards or, conversely, find themselves with an award that ought not to have been made and should not be enforced.

Quality control and future editions

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with *The Guide to Challenging and Enforcing Arbitration Awards* being seen as an essential desktop reference work in our field. To ensure content of high quality, I agreed to go forward only if we could attract as contributors those colleagues who were some of the internationally recognised leaders in the field. Emmanuel, Gordon and I feel blessed to have been able to enlist the support of such an extraordinarily capable list of contributors.

In future editions, we hope to fill in important omissions. In Part I, these could include chapters on successful cross-border asset tracing, the new role played by funders at the enforcement stage, and the special skill sets required by successful enforcement counsel. In Part II, we plan to expand the geographical reach even further.

Without the tireless efforts of the Global Arbitration Review team at Law Business Research, this work never would have been completed within the very tight schedule we allowed ourselves; David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this second edition of this publication will obviously benefit from the thoughts and suggestions of our readers on how we might be able to improve the next edition, for which we will be extremely grateful.

J William Rowley QC

London
April 2021

Part II

Challenging and Enforcing Arbitration Awards: Jurisdictional Know-How

21

Ecuador

Eduardo Carmigniani, Hugo García Larriva, Alvaro Galindo, Carla Cepeda Altamirano, Daniel Caicedo and Bernarda Muriel[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form?

According to Article 26 of the Arbitration and Mediation Law, for an award to be valid, it must be issued by majority and all the arbitrators must sign it. In the event of a dissenting opinion, it has to be appended to the award. Both the award and the dissenting opinion must contain the reasons for the decision.

According to Article 27 of the Arbitration and Mediation Law, if one of the members of the tribunal refuses or is unfit to sign the award or any other decision, the secretary of the tribunal will certify the event and the other members will sign, with no effect on the validity of the award or decision.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award? Are there provisions governing retractation or revision of an award? Under what circumstances may an award be retracted or revised (for fraud or other reasons)?

The Arbitration and Mediation Law provides that any party may request the extension or clarification of an award. Such a request must be made within three days of the notification

1 Eduardo Carmigniani, Hugo García Larriva and Alvaro Galindo are partners, and Carla Cepeda Altamirano, Daniel Caicedo and Bernarda Muriel are associates at Carmigniani Pérez Abogados.

of the award. Within the same period, the arbitral tribunal may be able to correct any numerical, calculation or typographical errors. The arbitral tribunal must issue its decision within 10 days of the date of a request for extension or clarification of the award.

The Arbitration and Mediation Law does not provide the possibility to retract or revise an award once it has been issued.

Appeals from an award

3 May an award be appealed to or set aside by the courts? What are the differences between appeals and applications to set aside awards?

Under Ecuadorian law, there is no recourse of appeal of an award. However, there are five grounds on which a party could request the setting aside (i.e., annulment) of an award:

- if the defendant has not been served with the statement of claim 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 of an order of the tribunal, and as a result the right of defence of that party has been impaired;
- if the tribunal did not decide on or declined to hear 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; and
- if the procedures for appointing the arbitral tribunal set forth either by law or contract were violated.

Applicable procedural law for setting aside of arbitral awards

Time limit

4 Is there a time limit for applying for the setting aside of an arbitral award?

Pursuant to Article 31 of the Arbitration and Mediation Law, the setting aside of the award shall be filed within 10 days of the award becoming final, that is within three days of the date of issuance of the award or within three days of the date the arbitral tribunal decides on the extension or clarification of the award.

Award

5 What kind of arbitral decision can be set aside in your jurisdiction? Can courts set aside partial or interim awards?

As per Article 31 of the Arbitration and Mediation Law, only final awards are subject to an annulment procedure.

Competent court

6 Which court has jurisdiction over an application for the setting aside of an arbitral award?

According to Article 31 of the Arbitration and Mediation Law, the setting aside of an award is heard by the President of the Provincial Court of Appeal of the seat of the arbitration.

Form of application and required documentation

7 What documentation is required when applying for the setting aside of an arbitral award?

Since the request for annulment must be filed before the arbitral tribunal, which will then transmit the entire file of the arbitration (including the request for annulment) to the President of the Provincial Court of Appeal, the applicant is not required to file certified copies.

Translation of required documentation

8 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with the application for the setting aside of an arbitral award? If yes, in what form must the translation be?

Article 200 of the General Code of Procedures provides that all documents written in a language other than Spanish must be translated by an official translator.

Other practical requirements

9 What are the other practical requirements relating to the setting aside of an arbitral award? Are there any limitations on the language and length of the submissions and of the documentation filed by the parties?

There are none.

Form of the setting-aside proceedings

10 What are the different steps of the proceedings?

The annulment procedure is twofold: written and oral phase. The written phase encompasses the request for annulment and the statement of defence thereto. The oral phase consists of a hearing at which the parties deliver their oral arguments before the court. Immediately after this, the judge will render his or her decision on the request.

Suspensive effect

11 Do setting-aside proceedings have suspensive effect? May an arbitral award be recognised or enforced pending the setting-aside proceedings in your jurisdiction?

Ordinarily a setting-aside procedure does not have suspensive effect. Notwithstanding, an applicant has the right to request a suspension and, after posting a bond to compensate any harm as a result of the delay in the enforcement, the tribunal could grant the stay of enforcement of the award.

Grounds for setting aside an arbitral award

12 What are the grounds on which an arbitral award may be set aside?

Pursuant to Article 31 of the Arbitration and Mediation Law, an award can be set aside 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 of 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 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 (*extra petitum* or *ultra petitum* award); and
- if the procedures for appointing the arbitral tribunal set forth either by law or contract were violated.

Decision on the setting-aside application

13 What is the effect of the decision on the setting-aside application in your jurisdiction? What challenges are available?

Depending on the alleged ground, the award can be annulled totally or partially. Furthermore, the Provincial Court of Appeal may revert the arbitral process before the annulment ground occurred. The only recourse available against an annulment decision is a constitutional injunction (*acción extraordinaria de protección*).

Effects of decisions rendered in other jurisdictions

14 Will courts take into consideration decisions rendered in the same matter in other jurisdictions or give effect to them?

Although there is no case law reported, the President of the Provincial Court of Appeal is not bound to give effect to decisions rendered in other jurisdictions.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

15 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 that required the recognition of foreign awards was repealed and former Article 42 of the Arbitration and Mediation Law re-entered into force. According to this Article, international awards shall have the same effects and can be enforced in the same form as domestic awards; that is to say, without the need for recourse to a prior recognition process. A party seeking the enforcement of an award must file a request of enforcement directly to a judge of first instance for civil and commercial matters.

Ecuador is a party to the 1958 New York Convention and the 1975 Panama Convention for the recognition and enforcement of foreign arbitral awards. Ecuador denounced the ICSID Convention and all bilateral treaties to which it was a party.

The New York Convention

16 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 signed 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

Time limit

17 Is there a time limit for applying for the recognition and enforcement of an arbitral award?

Recognition procedure is no longer required under Ecuadorian legislation. The special procedure to enforce an arbitral award can be initiated within five years of the decision being final. After that point, an award would be considered only as an ordinary commercial document containing a credit subject to enforcement by ordinary procedure provided that the request is filed within five years.

Competent court

18 Which court has jurisdiction over an application for recognition and enforcement of an arbitral award?

Neither foreign nor domestic awards need to obtain a prior recognition to be enforced. A party seeking the enforcement of either a foreign or a domestic 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 is that of the place where either the assets that are the subject of enforcement are located, or the arbitral award must deploy its effects.

Jurisdictional and admissibility issues

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

Neither foreign nor domestic awards need to obtain a prior recognition to be enforced. The requirements for a court to have jurisdiction for the enforcement of arbitral awards (whether domestic or foreign) are that an applicant (1) must file an enforcement petition, and (2) must file it before the judge of first instance for civil and commercial matters in the place where the defendant resides. If the defendant does not reside in Ecuador, the competent judge is that of the place where either the assets that will be the subject of enforcement are located, or the arbitral award must deploy its effects. The applicant has no obligation to identify assets at this stage of the proceedings.

Regarding admissibility requirements, there is a relative consensus that to enforce an award, it must put an end to the controversy and have the effect of *res judicata* under the law of the seat of the arbitration.

Form of the recognition proceedings

20 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*? What are the different steps of the proceedings?

Recognition procedure is no longer required under Ecuadorian legislation.

Form of application and required documentation

21 What documentation is required to obtain recognition?

Recognition procedure is no longer required under Ecuadorian legislation.

Translation of required documentation

22 **If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition? If yes, in what form must the translation be?**

Recognition procedure is no longer required under Ecuadorian legislation.

Other practical requirements

23 **What are the other practical requirements relating to recognition and enforcement? Are there any limitations on the language and length of the submissions and of the documentation filed by the parties?**

There are none.

Recognition of interim or partial awards

24 **Do courts recognise and enforce partial or interim awards?**

Recognition procedure is no longer required under Ecuadorian legislation.

Grounds for refusing recognition of an arbitral award

25 **What are the grounds on which an arbitral award may be refused recognition? Are the grounds applied by the courts different from those provided under Article V of the New York Convention?**

Recognition procedure is no longer required under Ecuadorian legislation.

Effect of a decision recognising an arbitral award

26 **What is the effect of a decision recognising an arbitral award in your jurisdiction?**

Recognition procedure is no longer required under Ecuadorian legislation.

Decisions refusing to recognise an arbitral award

27 **What challenges are available against a decision refusing recognition in your jurisdiction?**

Recognition procedure is no longer required under Ecuadorian legislation.

Recognition or enforcement proceedings pending annulment proceedings

28 What are the effects of annulment proceedings at the seat of the arbitration on recognition or enforcement proceedings in your jurisdiction?

Recognition procedure is no longer required under Ecuadorian legislation.

Enforcement proceedings may be adjourned, pending annulment proceedings of an award, if the applicant posts a bond. If the applicant does not request suspension of enforcement, then the award can be enforced regardless of the pendency of annulment proceedings.

Security

29 If the courts adjourn the recognition or enforcement proceedings pending annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security?

Recognition procedure is no longer required under Ecuadorian legislation.

Only if an applicant, when filing its request for annulment, moves for the suspension of the enforcement of the award, may the enforcement of the award be suspended. For this to happen, the applicant will have to comply with the order issued by the tribunal as to the bond. The standard applied by tribunals for fixing a bond is, according to Article 31 of the Arbitration and Mediation Law, 'the potential harm that the delay in the enforcement of the award may cause to the award creditor'.

Recognition or enforcement of an award set aside at the seat

30 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? If an arbitral award is set aside after the decision recognising the award has been issued, what challenges are available?

Recognition procedure is no longer required under Ecuadorian legislation.

As regards enforcement proceedings, the Arbitration and Mediation Law is silent on the issue and there is no precedent on point.

Service

Service in your jurisdiction

31 What is the procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction? If the extrajudicial and judicial documents are drafted in a language other than the official language of your jurisdiction, is it necessary to serve these documents with a translation?

There is no regulation for service of extrajudicial documents to a defendant in Ecuador. Conversely, service of judicial documents is regulated by the General Code of Procedures. In this case, the court will receive a petition and will issue an order containing the details of the 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.

Pursuant to Article 200 of the General Code of Procedures, all documents written in a language other than Spanish within a judicial procedure in Ecuador must be translated by a certified translator.

Service out of your jurisdiction

32 What is the procedure for service of extrajudicial and judicial documents to a defendant outside your jurisdiction? Is it necessary to serve these documents with a translation in the language of this jurisdiction?

Ecuadorian legislation does not provide for any specific regulation for service of extrajudicial documents to a defendant outside Ecuadorian jurisdiction.

Pursuant to Article 57 of the General Code of Procedures, service for Ecuadorian nationals outside Ecuador should be made by consular authorities. Nonetheless, for non-Ecuadorian nationals, as Ecuador is part of the Inter-American Convention on Letters Rogatory and the Vienna Convention on Consular Relations, the service could be made in accordance with these instruments.

Identification of assets

Asset databases

33 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 shareholders information database to which a creditor could resort. This information allows the enforcing party to determine a debtor's sizable assets even before filing for recognition of the award.

Information available through judicial proceedings

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

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

Enforcement proceedings

Attachable property

35 What kinds of assets can be attached within your jurisdiction?

The assets that can be attached in Ecuador are movable and immovable; intangible property is reputed to be movable.

Availability of interim measures

36 Are interim measures against assets available in your jurisdiction?

Ecuadorian law provides for specific rules concerning interim measures against assets, and it does not distinguish between assets owned by private parties and 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 that:
  - the debtor's assets are not enough to cover the credit;
  - the debtor could hide the assets or make the assets disappear; or
  - the debtor is trying to dispose of or sell the assets.

Procedure for interim measures

37 What is the procedure to apply interim measures against assets in your jurisdiction?

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

Interim measures against immovable property

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

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

Interim measures against movable property

39 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 depositary, which has a duty of care and conservation of the asset until proper security is granted or until the end of the proceedings.

Interim measures against intangible property

40 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 (the Ecuadorian Intellectual Property Act), intangible property is reputed to be movable for the constitution of encumbrances. For its seizure and auction, the procedures prescribed in the General Code of Procedures shall be followed.

Attachment proceedings

41 What is the procedure to attach assets in your jurisdiction?

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.

Attachment against immovable property

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

According to Article 384 of the General Code of Procedures, the attachment of immovable property starts with the order of seizure of the property and its registration on the respective property registry.

Attachment against movable property

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

According to Article 381 of the General Code of Procedures, 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.

Attachment against intangible property

44 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 (the Ecuadorian Intellectual Property Act), intangible property is reputed to be movable for the constitution of encumbrances. For its seizure and auction, the procedures prescribed in the General Code of Procedures shall be followed.

Attachments against bank accounts

45 Is it possible in your jurisdiction to attach bank accounts opened in a branch or subsidiary of a foreign bank located in your jurisdiction or abroad? Is it possible in your jurisdiction to attach the bank accounts opened in a branch or subsidiary of a domestic bank located abroad?

As a matter of territorial jurisdiction, Ecuadorian judges can attach any bank accounts opened in Ecuador, either in a local bank or in a branch or subsidiary of a foreign bank duly authorised to operate in Ecuador. Ecuadorian judges cannot order the attachment of bank accounts located outside Ecuador.

Enforcement against foreign states

Applicable law

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

There are none.

Availability of interim measures

47 May award creditors apply interim measures against assets owned by a sovereign state?

They may, provided that the targeted asset is not protected by immunity. 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 interim measurers being applied.

Service of documents to a foreign state

48 What is the procedure for service of extrajudicial and judicial documents to a foreign state? Is it necessary to serve extrajudicial and judicial documents with a translation in the language of the foreign state?

Ecuadorian legislation does not provide for any specific regulation for the service of extrajudicial documents. According to Article 61 of the General Code of Procedure, judicial documents must be served to a foreign state through a diplomatic note issued by the Foreign Minister of Ecuador, which requires an official translation of the documents into the language of the foreign state.

Immunity from enforcement

49 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? Are there exceptions to 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 absolute immunity from execution. In reference to assets other than the aforesaid, 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.

Waiver of immunity from enforcement

50 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? What are the requirements of waiver?

A state can expressly waive its immunity from enforcement provided that the requirements under customary international law have been fulfilled (i.e., 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). Note that a waiver of immunity from jurisdiction neither entails nor implies a waiver of immunity from enforcement.

Piercing the corporate veil and alter ego

51 Is it possible for a creditor of an award rendered against a foreign state to attach the assets held by an alter ego of the foreign state within your jurisdiction?

It is possible provided that (1) an authorisation to pierce the corporate veil is granted and (2) the targeted assets are not covered by immunity.

Regarding the first point, above, a creditor of an award rendered against a foreign state seeking to attach the assets held by an alter ego of the foreign state must first obtain a judicial order authorising the piercing of the corporate veil of that alter ego. This is a special action that has to be filed before the National Court of Justice since it will involve a sovereign state as defendant.

On the second point, above, 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 being covered by immunity.

Appendix 1

About the Authors

Eduardo Carmigniani
Carmigniani Pérez Abogados

As profiled by *Chambers and Partners*, Eduardo Carmigniani 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 a member of the ICC Latin American Group. His recent representations include an Ecuadorian group in an ICC arbitration with its seat in Mexico regarding a cross-border acquisition of a corporation in the dairy industry; a Mexican investor in an arbitration matter under the rules of the CIAM regarding the breach of a concession contract; an Ecuadorian company in a 28 US Code Section 1782 action in the courts of Florida; an Ecuadorian corporation in a successful negotiation regarding an exclusivity clause contained in a supply contract; and a company in several constitutional challenges of legislative measures that levy a tax on telecommunications infrastructure in different municipalities.

Hugo García Larriva
Carmigniani Pérez Abogados

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 Pérez, 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 Universiy San Francisco of Quito, and director and general editor of the *Ecuadorian Arbitration Review* and *Ecuadorian Arbitration Gazette*.

Mr García Larriva's recent representations include an Ecuadorian group in an ICC arbitration with its 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 Central Bank of Ecuador before the Judicial Committee of the Privy Council (UK); and representing Ecuador in two proceedings before the Andean Court of Justice regarding alleged restrictions to trade.

Alvaro Galindo
Carmigniani Pérez Abogados

Dr Alvaro Galindo focuses his practice on arbitration under investment treaties and contracts in strategic sectors (e.g., energy, telecommunications and construction). He concentrates his practice in arbitrations involving states and state entities. Additionally, he acts as an arbitrator in domestic and international proceedings. Prior to joining Carmigniani Pérez, Dr Galindo worked in Dechert LLP's Washington office and served as Director of International Affairs and Arbitration at the Attorney General's Office of Ecuador.

Dr Galindo is Adjunct Professor of international arbitration at Georgetown University and American University. He is a *pro bono* member of the Latin American Alumni Board of Georgetown University Law Center. Currently, he is a member of the International Chamber of Commerce International Court of Arbitration, an arbitrator in arbitration centres in Ecuador and elsewhere in the LATAM region, and a member of the committee of the Permanent Court of Arbitration (PCA), The Hague, for the drafting of the amendments to the PCA Arbitration Rules; he was a member of the PCA Court of Arbitration until February 2020.

Dr Galindo has been recognised by *The Legal 500 Latin America* since 2012 and was noted as 'outstandingly intelligent' and for his 'incomparable capacity for coordinating, planning, strategic assessment, and for his diplomatic approach'.

Carla Cepeda Altamirano
Carmigniani Pérez Abogados

Carla Cepeda Altamirano holds an LLM from Stanford University, School of Law, EEUU, with a specialisation in international economic law, business and policy. She focuses her practice on arbitration and litigation processes. She offers her clients assistance, representation and advice in disputes relating to public, civil, commercial and corporate law matters. Carla has experience in alternative dispute resolution proceedings, corporate consultancy, litigation strategies, highly regulated industries, national and international arbitration. She is member of the academic committee of the National Arbitration Competition, the Ecuadorian Arbitration Institute and the Spanish Arbitration Club. Carla is also a member of the Executive Committee of the Ecuadorian Very Young Arbitration Practitioners and has been designated as Arbitrator Intelligence Ambassador 2020–2021.

Before joining Carmigniani Pérez, Carla worked as corporative and tax legal consultant in Moore Stephens Profile. Carla carried out 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, contracts and inheritance law.

Daniel Caicedo
Carmigniani Pérez Abogados

Daniel Caicedo is part of the litigation and arbitration team of Carmigniani Pérez Abogados, in Guayaquil. His practice focuses on advising national and foreign clients in civil, commercial and labour arbitration and litigation.

Since his incorporation to the firm, he has successfully been involved in arbitrations in the telecommunications sector and the commercial area.

He was the editor of the *Law Review* of the Faculty of Law and was assistant professor in civil procedural law at the San Francisco Catholic University of Quito. Daniel represented that university in the National Arbitration Competition (2018–2019) and in the International Arbitration Competition (2018).

He is member of the academic committee of the National Arbitration Competition and the Ecuadorian Arbitration Institute. Daniel participated as an arbitrator in the pre-moot conducted by Alumni Arbitration for the 2020 International Arbitration Competition.

Bernarda Muriel
Carmigniani Pérez Abogados

Bernarda Muriel is a member of the Carmigniani Pérez litigation and arbitration team, focusing her practice on commercial arbitration and commercial as well as administrative litigation. Moreover, Bernarda has relevant experience in arbitration proceedings in construction and telecommunications. In addition to her practice in dispute resolution, Bernarda renders advice to clients on corporate matters, in real estate issues and due diligence processes.

Prior to joining Carmigniani Pérez, Bernarda worked at the Ecuadorian Arbitration Institute as a coordinator, also taking care of the publication of the *Ecuadorian Arbitration Magazine* annually.

In the academic field, Bernarda currently works as an assistant professor of fundamental legal concepts and subjects, theory of legal norms and arbitration processes at the San Francisco University of Quito. She is member of the academic committee of the National Arbitration Competition, the Ecuadorian Arbitration Institute, Arbitraje Alumni, Ambassador for Arbitrator Intelligence, and alumnus of the Hague Academy of International Law.

Carmigniani Pérez Abogados
Avenida 9 de Octubre 100
Edificio La Previsora Of. 2202
Guayaquil
Ecuador
Tel: +593 4 2 300 600

Avenida Naciones Unidas E2-30 y Núñez de Vela
Ed. Metropolitan Plaza Of. 1108
Quito
Ecuador
Tel: +593 2 3 959 590

ecarmi@cplaw.ec
hgarcia@cplaw.ec
agalindo@cplaw.ec
ccepeda@cplaw.ec
dcaicedo@cplaw.ec
bmuriel@cplaw.ec
www.cplaw.ec

Enforcement used to be an irrelevance in international arbitration. Most losing parties simply paid. Not so any more. The time spent on post-award matters has increased vastly.

The Guide to Challenging and Enforcing Arbitration Awards is a comprehensive volume that addresses this new reality. It offers practical know-how on both sides of the coin: challenging, and enforcing, awards. Part I provides a full thematic overview, while Part II delves into the specifics seat by seat, covering 26 jurisdictions.

Visit globalarbitrationreview.com
Follow @garalerts on Twitter
Find us on LinkedIn

ISBN 978-1-83862-575-7