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Practice Update

Ecuador Ruling Marks Significant Step for Arbitral Certainty

July 9, 2024

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On May 9, a company incorporated in the Netherlands, CW Travel Holdings NV, succeeded in the Constitutional Court of Ecuador, arguing that lower courts in Ecuador violated Ecuador's constitution by refusing to consider CW Travel's request to enforce an International Chamber of Commerce arbitration award.

The ruling is significant because the CCE rejected an Ecuadorean lower court's decision that the ICC arbitration award must be homologated before it could be enforced. It is also a decision from the CCE and thus guards against constitutional challenges to a foreign arbitral award, which is a practice that, as discussed below, is employed by parties seeking to avoid enforcement of arbitral awards in Latin American countries' domestic courts.

To provide background, "homologation" or "exequatur" is court approval within a jurisdiction that is granted for certain actions of an outside institution to give that outside institution's decision force or binding effect in the jurisdiction where the court granting homologation or exequatur is located. Under this principle, local courts within a country must review an arbitral award granted outside of the court system of that country to approve its validity and binding effect within that particular country.

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Homologation is a principle that is prevalent in civil law jurisdictions but not in common law jurisdictions such as the United States.[1]

Latin American countries generally are civil law jurisdictions, and therefore homologation is a legal principle that persists in Latin America.

Homologation is essentially a review of the arbitral award to confirm its legitimacy, which — if such review disturbs the merits of the award or imposes undue burden or costs to enforce the award — is plainly contrary to the purpose of international arbitration treaties, particularly the New York Convention and the Inter-American Convention on International Arbitration.

The New York Convention explicitly provides that: "There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."[2]

The Inter-American Convention on International Commercial Arbitration, also referred to as the Panama Convention, has the same purpose and was signed by most countries in Latin America.[3] Like the New York Convention, that treaty too has a principal goal of the uniform and efficient recognition of arbitral awards resulting from international arbitration.[4]

In the recent case decided by the CCE, the CCE invoked its jurisdiction to review the lower court's refusal to enforce CWT Travel's arbitral award based on the CCE's authority to review judicial decisions that violate constitutional rights.[5]

CW Travel argued that its constitutional right to access to the justice system was violated because Ecuadorian lower courts required homologation of the arbitral award, a requirement — per CW Travel —

that was contrary to Ecuadorian law and international treaties.[6]

CW Travel asserted that the lower court violated Article 32 of Ecuador's Law of Arbitration and Mediation, which provides that once an award is executed, the parties must comply with it immediately. The law further provides that any party may ask judges to order the execution of the award by presenting a certified copy of the award granted by the secretary of the court or the director of the center or the arbitrator or arbitrators, with the reason to be executed.[7]

The CCE agreed with CW Travel, reasoning that in parallel with national regulations, Ecuadorian courts must account for the fact that Ecuador has entered into international treaties regarding the execution of foreign awards.[8] The CCE ruled that the lower court, by requiring that the arbitral award be homologated prior to its execution, violated CW Travel's constitutional rights and placed an unreasonable restraint on CW Travel's right to access the Ecuadorian courts.[9]

The lower court also violated CW Travel's constitutional right to effective judicial recourse by requiring homologation of the arbitral award, reasoning that requiring homologation placed on CW Travel an unreasonable requirement and prevented CW Travel from accessing the legal processes available in Ecuador for executing a judgment.[10]

The CCE's decision vindicates the spirit of the New York Convention. Other high courts in Latin America should follow suit and unambiguously end any burdensome requirement of homologation of foreign arbitration awards or lengthy litigation involving constitutional challenges to arbitral awards.

Commentators, such as Álvaro López de Argumedo Piñeiro, have noted that the New York Convention is increasingly being applied in Latin America with a trend in favor of recognizing the New York

Convention, but that further developments in the case law throughout Latin America are needed.[11]

For example, Andrés Bobadilla and Gabriella Muñiz Bobadilla have observed that local courts in the Dominican Republic, including a decision by its highest court within the last five years, have followed the spirit of the New York Convention and do not consider the principle of homologation as grounds to revisit the merits of an arbitral award.[12]

Other countries, however, have been observed to employ a process for execution of arbitral awards which, in practice, is time-consuming, uncertain and would give cause for foreign companies doing business in Latin America to question the value of obtaining a foreign arbitration award at all.[13]

The more there are decisions like the CCE decision discussed in this article, the more likely it is for domestic courts to make enforcement of foreign arbitral awards less costly and complicated, without significant risk of doctrines like homologation and constitutional challenges impeding enforcement of foreign arbitration awards in Latin America.

The CCE's decision comes during a time when several decisions and legislative developments in Latin America bring this issue to the forefront.

In Colombia, on June 20, Colombia's Supreme Court denied homologation of an arbitral award obtained in the International Centre for Settlement of Investment Disputes in Paris by a Canadian mining company, Rusoro Mining Ltd., against the state of Venezuela on principles of state sovereignty. This was an award that was found to be enforceable in the U.S. by the U.S. District Court for the District of Columbia in Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela in 2018.[14]

Earlier this month, Mexico has amended its law that allows for collateral, constitutional attacks on arbitration awards. Specifically, the amendments

limit the availability of this procedure, known as "amparo," but the amendments still leave open the possibility to challenge awards using this procedure. How these amendments materialize in Mexico warrant a close look in the coming years.[15]

In Panama, on the other hand, there have been recent pro-arbitration trends in line with the CCE's decision.

In the last month, the Panamanian Supreme Court confirmed in CNO SA. v. Integ Panama Corp. and Nacional de Seguros de Panamá y Centroamérica SA that foreign-licensed attorneys may act not only as arbitrators, but also as counsel in Panama-seated international arbitration proceedings.[16]

This comes on the heels of a ruling in April 2023 in which the same court rejected the use of the "amparo" procedure to annul an arbitration award.[17]

At a time when businesses are turning more and more toward arbitration as a means of resolving their commercial disputes, imposing a requirement of homologation to enforce any final arbitral award will only serve to make international companies shy away from doing business in the Latam region. This antiquated requirement has no room in the modern business world that requires fast and neutral resolutions to business disputes. It simply flies in the face of the needs of modern business.

The CCE's decision is a positive development in this regard. The CCE's decision is well reasoned, and it is a powerful data point and precedent for other Latin American countries to follow.

Ultimately, the end of homologation requirements in Latin America fosters greater certainty in the resolution of international business disputes and reduce the time and costs for resolving disputes. This, in turn, has the promise of attracting U.S. investors and companies that might have otherwise

refrained from doing business in Latin America out of fear that enforcing an arbitral award would be too costly, uncertain or time-consuming.

These risks were evident, for example, in the case of COMMISA, a Mexican subsidiary of a U.S. corporation, in which Mexican courts annulled a $300 million arbitration award in favor of COMMISA against Pemex, a Mexican state-owned entity.[18] COMMISA eventually succeeded in validating the arbitration award in the U.S.; however, COMMISA endured many years of litigation both in the United States and Mexico to achieve this result.[19]

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[1] See, e.g., Succession of Mosing, 2021-9 (La. App. 3 Cir. 12/8/21), 331 So. 3d 1013, 1018 (court in the United States' only state whose legal code was derived from civil law referencing principle of homologation and statute regarding homologation).

[2] (See Sentencia 3232-19-EP/24 at 6 ¶6, available at b5676797-798b-48f6-849e-2e35b546ed9c.pdf.pdf (lbr.cloud) (quoting Article III of the New York Convention).

[3] See Signatories and Ratifications, Inter-American Convention on International Arbitration. OAS.org, https://www.oas.org/juridico/english/sigs/b-35.html (last visited June 18, 2024).

[4] See Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc., 23 F.3d 41, 45 (2d Cir. 1994) ("The legislative history of the Inter–American Convention's implementing statute, however, clearly demonstrates that Congress intended the Inter–American Convention to reach the same results as those reached under the New York Convention[.]")

[5] (Sentencia 3232-19-EP/24 at 3, ¶11.)

[6] (Id. at 3, ¶13.)

[7] (Id. at 5, ¶15.)

[8] (Id. ¶41.)

[9] (Id. ¶¶ 51, 62.)

[10] (See id. ¶¶75-76.)

[11] E.g., Álvaro López de Argumedo Piñeiro et al., The New York Convention in Latin America at 48, in The Guide to Arbitration in Latin America (2d Ed.) (2023), available at https://www.uria.com/documentos/colaboraciones/3534/documento/UMarticle.pdf?id=13514_en&forceDownload=true.

[12] See Andrés E Bobadilla & Gabriella M Muñiz Bobadilla, Law 489-08: A Deep Dive Into the Dominican Republic's Arbitration Framework, Latin Lawyer (Nov. 21, 2023), https://latinlawyer.com/guide/the-guide-international-arbitration-in-latinamerica/second-edition/article/law-489-08-deep-dive-the-dominican-republics-arbitrationframework#footnote-000-backlink (last visited June 19, 2024); see also Journal of International Arbitration, Volume39,Issue 3(2022) at433-452.

[13] See, e.g., Luis E Dates et al., Constitutional Remedies Meet Arbitration in Latin America (November 21, 2023), https://latinlawyer.com/guide/the-guide-international-arbitration-inlatin-america/secondedition/article/constitutional-remedies-meet-arbitration-in-latinamerica (last visited June 19, 2024) (observing constitutional procedures in Argentina, Brazil, Mexico, and Colombia to challenge arbitral awards, and noting that the procedure of amparo in Mexico can delay enforcement of an award); Manuel A. Gómez, The Global Chase: Seeking the Recognition and Enforcement of the Lago Agrio Judgment Outside of Ecuador, 1 Stan. J. Complex Litig. 429, 462 (2013) (discussing homologation procedures in Argentina and observing, in a particular instance, the complexity and difficulties encountered by Argentina's process for homologation); Henry

Burnett, Recent Developments in Key Latin American Jurisdictions to Attract International Commercial Arbitration, 5 Am. U. Bus. L. Rev. 387, 394-96 & 401-03 (2016) (noting Chilean and Peruvian courts' hesitancy to interfere with merits of arbitral award the uncertainty that exists in Colombia based on certain legal procedures unique to Colombia that are available to annul a judgment).

[14] See Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, 300 F. Supp. 3d 137, 151 (D.D.C. 2018).

[15] See Mexico passes laws to expand president's amnesty powers & limit courts' oversight, Reuters, available at https://www.firstpost.com/world/mexico-passes-laws-toexpand-presidents-amnesty-powers-limit-courts-oversight-13782740.html (last visited June 25, 2024) ("The other amendment limits judges' ability to provisionally suspend laws and federal works under a legal process designed to prevent abuses of power known as an 'amparo.'").

[16] See Mayte Sanchez and Alejandro Chevalier, Panama Supreme Court rules on role of foreign attorneys in arbitration, available at https://globalarbitrationreview.com/article/panama-supreme-court-rules-role-of-foreignattorneys-in-arbitration (last visited June 25, 2024).

[17] See Susannah Moody, Panama's top court affirms awards are not subject to amparos, Global Arbitration Review, available at https://globalarbitrationreview.com/article/panamastop-court-affirms-awards-are-not-subject-amparos (last visited June 25, 2024).

[18] Corporacion Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex- Exploracion Y Produccion, 832 F.3d 92, 97 (2d Cir. 2016).

[19] Id. (noting that the litigation that was the subject of the court's 2016 decision began in 2004).