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Dispute resolution forum alternatives in Ecuador for international parties

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SUMMARY: **1.** Introduction. **2.** International arbitration. **2.1** Regulation of the process for recognition and execution of foreign awards in Ecuador. **2.2** Short description of the process for recognition and execution of foreign arbitral awards and foreign judgments in Ecuador. **2.2.1** Recognition process. **2.2.2** Execution process. **3.** Arbitration in Ecuador and annulment of awards under COGEP. **3.1** Domestic arbitration procedure. **3.2** Annulment of awards. **3.2.1** Annulment process. **3.2.2** Appeals and revision. **4.** Litigation in Ecuador. **4.1** When the counterparty is the Ecuadorian State or a public entity. **4.1.1** Requirements of COGEP's article 104 regarding the execution of awards pronounced against the State. **4.1.2** Does the last requirement of COGEP's article 104 violate the NYC? **4.1.3** Difficulties in the execution of awards in the case of State/public entities. **5.** Conclusion.

PALABRAS CLAVE: arbitraje internacional, reconocimiento de laudos, homologación, ejecución, arbitraje nacional, recurso de nulidad, estado parte.

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KEY WORDS: international arbitration, award recognition, enforcement, domestic arbitration, annulment, State party.

RESUMEN: El propósito de este artículo es explorar las diferentes opciones disponibles para las empresas extranjeras en la negociación de contratos con contrapartes ecuatorianas. El artículo analizará la conveniencia práctica del arbitraje internacional a la luz de la práctica actual de reconocimiento y ejecución de laudos extranjeros en Ecuador. A continuación, se analizará la conveniencia del arbitraje nacional, examinando la práctica y los estándares de calidad vigentes, así como en el procedimiento de anulación de laudos. Finalmente, estudiaremos el caso particular al contratar con el Estado ecuatoriano o con una entidad pública. Examinaremos las dificultades del reconocimiento y la ejecución de dichos laudos.

ABSTRACT: The purpose of this paper is to explore the different options available to foreign companies when negotiating contracts with Ecuadorian counter-parties. The paper will analyze the practical convenience of international arbitration in the light of the current practice for recognition and enforcement of foreign awards in Ecuador. Then it will analyze the convenience of domestic arbitration by looking at current practice and standards as well as at the annulment of awards procedure. Finally, we will study the specific case of contracting with the Ecuadorian State or one of its publicly-owned entities. We will look into the difficulties of recognition and enforcement of such awards.

1. Introduction

This analysis aims, in the light of Ecuador's new procedural law, to re-think and re-evaluate the efficiency and effectiveness of the different paths available for dispute resolution with an Ecuadorian counterparty; namely, to assess the convenience of

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agreeing to international arbitration, arbitration in Ecuador, or submitting the dispute to the jurisdiction of foreign courts or Ecuadorian domestic courts. Finally, a special section of this paper will be addressed to analyze the different scenarios that arise when the counterparty is the Ecuadorian State or one of its public entities.

2. International Arbitration

In the past, it was common and advisable practice to submit most contracts with Ecuadorian counter-parties to international arbitration, especially material contracts where important amounts of money were at stake[1]. The rationale behind choosing this forum was mainly to avoid the so-called home court advantage, since foreign companies are generally fearful of litigating in Ecuador due to various reasons, including lack of specialization of the judges, issues of confidentiality, absence of predictability of decisions, delays in the administration of justice, amongst other complaints. International arbitration, on the other hand, constitutes a more neutral and specialized forum where disputes tend to be settled more efficiently by prestigious practitioners.

However, arbitration in and by itself lacks teeth, meaning that, although awards are binding upon the parties and theoretically should be complied with voluntarily, this is not always the case. Losing parties do not always abide by the awards willingly, thus many times judicial execution is needed. It is at this second stage that, due to recent procedural reforms, international arbitration has lost some of its appeal in Ecuador.

Thus, even if international arbitration provides fast and legally well-thought-of awards, what benefits does it imply if it cannot be enforced in Ecuador? This is the central question that we will attempt to address thoroughly throughout this paper.

1. Now the same can be said regarding smaller contracts, which can be submitted to the recently published ICC Expedited Procedure Provisions, «https://iccwbo.org/dispute-resolution-services/arbitration/expedited-procedure-provisions/».

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2.1 Regulation of the process of recognition and execution of foreign awards in Ecuador

A new Ecuadorian Civil Procedure Code (COGEP by its Spanish initials) was approved in May 2015. COGEP introduced a myriad of procedural reforms into the Ecuadorian legal system, including important reforms regarding the execution of foreign arbitral awards which are now treated in the exact same way as foreign judgments.

Before COGEP, it was debatable if international arbitration awards had to go through a process of recognition in Ecuador[2] because, according to the New York Convention (NYC), they could be executed directly. However, COGEP requires an additional process of recognition of arbitral awards prior to their execution. COGEP establishes the requirements[3] and procedures to be followed for execution of foreign awards[4]. Additionally, the new norms established in COGEP do not contradict the rules for

2. Á. Galindo & H. García, "Relación entre el Código Orgánico General de Procesos y el procedimiento arbitral", Revista Ecuatoriana de Arbitraje, *Revista Ecuatoriana de Arbitraje*, No. 6, 2014, p. 72.
3. Free translation. COGEP, RO Sup. No. 506, 22/05/2015, Art. 104.- For e homologation of judgments, arbitration awards and mediation records issued abroad, the competent chamber of the Provincial Court must verify: 1. Having the external formalities necessary to be considered authentic in the state of origin. 2. That the judgment passed with the authority of *res judicata* according to the laws of the country where it was issued and the necessary annexed documentation are duly legalized. 3. If needed, be translated. 4. That it be evidenced with the pertinent procedural documents and certifications stating that the defendant was legally notified and that the proper defense of the parties has been assured. 5. That the application indicates the place of summons of the natural or legal person against whom the resolution issued abroad should be enforced. For the purpose of recognizing judgments and arbitration awards against the State, since they are not commercial matters, it must also be demonstrated that they do not contravene the provisions of the Constitution and the laws, and that they are in accordance with the international treaties and conventions in force. In the absence of international treaties and conventions, they shall be fulfilled if they appear in the respective warrant or if the national law of the country of origin recognizes its effectiveness and validity.
4. Free translation. COGEP, N. 3, Art. 105.- In order to proceed with the homologation, the applicant shall submit his application to the competent chamber of the Provincial Court, which, after having examined its compliance with this chapter, shall order to summon the defendant at the place indicated for the purpose. Once the person against whom the judgment will be enforced has been summoned, he will be allowed the term of five days to present and prove his opposition to the homologation. The judge will resolve within thirty days from the date of the summons. If duly substantiated and accredited opposition is filed and the complexity of the case so warrants, the Court shall convene a hearing, which shall be substantiated and resolved in accordance with the general rules of this Code. The hearing must be called within a maximum period of twenty days from the time the opposition was filed. The Chamber will resolve at the same hearing. Only horizontal recourses can be brought against the judgment of the Chamber of the Provincial Court. Once the homologation has been resolved, the judgments, awards and mediation documents from abroad shall be complied with as provided in this Code for execution.

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recognition of international court rulings provided for in article 208(6) of the Ecuadorian Judicial System Law (COFJ).

Ecuador is a member of the NYC. It is worthwhile to note that Ecuador expressed its reservation as to applying the Convention only to differences arising out of legal relationships[5], whether contractual or not, that are considered commercial under domestic law. Thus, the NYC should apply even in opposition to COGEP. Ecuadorian scholar Vanesa Aguirre[6] points out:

> For recognition of international awards and their subsequent execution, the corresponding chamber of the provincial court and the court of first instance, respectively, must first verify what is established in the international instrument in question and, in any case, interpret the provisions of COGEP in harmony.

2.2 Short description of the process of recognition and execution of foreign arbitral awards and foreign judgments (re foreign awards) in Ecuador

COGEP has made the process of recognition and execution of foreign awards two-tiered.

Thus, every foreign award must first go through a process of recognition before a specific court, and once it is recognized it must be executed in a separate proceeding before a different court.

2.2.1 Recognition process

The process of recognition of foreign awards is heard by the Provincial Court which is the court of second instance in Ecuador. The Provincial Court where the request for recognition must be

5. See, Signatories to the New York Convention, «http://www.newyorkconvention.org/countries».
6. V. Aguirre, "La ejecución de los laudos internacionales en Ecuador y el Código Orgánico General de Procesos", *Revista Ecuatoriana de Arbitraje*, No. 6, 2014, p. 106.

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presented is the one at the location where the party against whom the award is being sought has its domicile.

COGEP's article 104 requires the applicant to fulfill certain requirements; however, this should not be understood as shift of the bias in favor of execution as present in the NYC. The NYC Interpretation Manual developed by the International Council for Commercial Arbitration establishes, as a cardinal principle, the so-called "bias in favor of enforcement" under which, in the case of two or more possible interpretations, the domestic courts must apply the interpretation that best favors recognition and execution of the award[7].

According to COGEP it is the applicant who must demonstrate (**i)** that the award complies with the external formalities required by the State in which it was issued, (**ii)** that the award has acquired the authority of *res judicata* according to the State where it was issued, **(iii)** translation of the documents, if needed, (**iv)** the applicant must prove, with procedural documents, that the parties' right to defense and to the due process was respected; and (**v)** the request must indicate the place to summon the party against which the homologation is being sought.

Some of these requirements have cast important doubts as to their scope and possible interpretation by the Provincial Courts in Ecuador.

i) The first requirement is that the award must fulfill the essential formalities of its place of origin. In the case of foreign awards, the aforementioned compliance must be contrasted with the law applicable to the foreign award-usually the seat.

ii) The second requirement is if the award has been recognized as *res iudicata*. The applicant must attach a copy of the award together with some evidence proving that the award has the authority of *res iudicata* in its country of origin. In administered arbitrations, the arbitration rules of those centers and/or

7. International Council for Commercial Arbitration (ICCA), *ICCA Guide to the Interpretation of the 1958 New Convention*, «https://goo.gl/kocwXt», p. 15.

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their authorities will determine if the award has the authority of *res iudicata*. The issue could be more challenging in ad-hoc arbitrations.

However, this requirement should not be understood as needing an additional court order issued by the state of origin declaring that the award has the authority of *res iudicata*, since that would come close to the concept of double exequatur, forbidden by the NYC[8].

It should be noted that in accordance with COGEP's article 201, all documents issued abroad must be authenticated either by the respective consulate or apostilled pursuant to The Hague Convention.

iii) The requirement relating to translation of legal documents applies to all processes under COGEP in accordance with COGEP's article 200. The only question here is whether the translation should be a sworn translation such as required by the NYC, or if the translation must be done by a registered expert "*perito*" qualified by the Judiciary, which seems absurd if one considers that many of these awards are already translated abroad. Finally, even if a contradiction exists, which we consider it does not, if the NYC relaxes the national requirements it should apply over and above COGEP[9].

iv) The fourth requirement is perhaps the more troublesome since it sets on the applicant the burden to prove that the proceeding, which ended with the award that is subject to recognition, did comply with the due process and that it respected the parties' right to defense. It is not clear which documents prove that the due process was respected.

It would be excessively burdensome and unnecessary for the Court to interpret requirement **(iv)** in that the applicant must present to the Court the entire arbitral process certified, authenticated and translated.

8. Á. Galindo & H. García, N. 2, p. 54.
9. Ídem, p. 75.

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This requirement should be understood as having been met by displaying only certain key records of the case such as summons, the answer presented by the defendant, or transcripts of the hearings showing that the defendant had the chance to defend itself and that the due process was followed.

v) Finally, the last condition refers to including in the claim the place where the defendant can be summoned.

There has been some concern expressed by some practitioners of the area[10] who fear that these specifications, in practice, will constitute double exequatur. They fear that the court of execution in Ecuador might interpret that for an arbitral award to comply with requirements **(i)**, **(ii),** and **(iv)** there must be a ruling or certification from a court of the state of origin certifying that the award complies with its formal domestic requirements, that the award can be considered *res iudicata* in its state of origin, and that the due process was followed.

This interpretation would be wrong and would violate the prohibition of *substantially more onerous conditions* set in the NYC[11].

Once the request for recognition of a foreign award is filed with the Court, it will summon the defendant and grant him five days to oppose the recognition. However, this opposition is quite limited and should not be understood as an answer to the subject matter of the dispute.

The defendant can only oppose the recognition in one of two ways as follows: **(i)** either by arguing that the request for recog-

10. See, ídem, p. 80, V. Aguirre, N. 6, p. 106, and E. Carmigniani, C. Cepeda & H. García, "Arbitraje en Ecuador: Desarrollo Jurisprudencial y Reformas", *Revista Ecuatoriana de Arbitraje*, No. 7, 2015, p. 167.
11. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Article III: Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. *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* (emphasis added), «https://goo.gl/hv1SKX».

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nition does not comply with one of the requisites of COGEP listed above, or **(ii)** by using one of the five ways to oppose the recognition of foreign awards established in article V of the NYC in the case of arbitral awards.

If there is opposition, the Chamber of the Provincial Court can summon the parties to a hearing where it will decide the matter. If there is no opposition or if the Court dismisses such opposition, the Court will pronounce a declarative ruling recognizing the award in Ecuador. Once recognition of the award is obtained, the second tier of the process –execution– begins.

The first tier of the process should not take a very long time, depending if there is opposition or not. If there is no opposition, it should take no more than a couple of months. However, if there is opposition it could take much longer in practice. The problem is that the Court will summon the defendant, alerting him on the procedure so the defendant will have time to hide assets, which will not be frozen until the execution process some months later.

Thus, when there is the risk of assets being hidden, our recommendation is to file the request for recognition together with a request for precautionary measures. In our opinion, a foreign award is sufficient proof under COGEP's article 125[12] *fumus bonis iuris* to allow a court to grant precautionary measures. However, this is a difficult subject[13], and some courts have refused to give any evidentiary value to awards that are yet to be recognized in Ecuador[14].

2.2.2 Execution process

The process of executing a foreign award after it has been recognized as described above is basically the same as any execu-

12. Article 125 of COGEP requires prima facie proof of the debt and unlikeliness that the credit can be collected.
13. See, Á. Galindo & H. García, N. 2, p. 78.
14. See, Civil Judicial Unit of the Metropolitan District of Quito, Process No. 17230-2016-04898G, 9/12/2016.

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tion procedure in Ecuador, including the special laws applicable to State property.

The Court that executes a recognized award is the court of first instance at the domicile of the defendant or, if the claimant prefers, the judge of the place where the assets to be executed are located.

If the award includes payment of interest, the Court will settle interest and then allow the debtor 24 hours to either pay or set aside goods to be auctioned, and with the money obtained from the auction to pay the creditor.

If the debtor does not set aside any property, the creditor will ask the judge to seize the debtor's goods in order to auction them and to collect its credit. As a general rule, it is preferred to seize money (bank accounts for example) because in this way the auctioning the assets is avoided.

If the debtor pays at the request of the Court, enforcement of the recognized award may take from three to six months. If the debtor defaults and uses all available mechanisms to delay the process, it can take much longer.

As we will explain below, there are special difficulties that arise when the debtor is the State or State-owned entities.

Finally, it is worth mentioning that recognition of the award can be subject to control by the Constitutional Court in Ecuador via an Extraordinary Protection Action (AEP) if one of the parties feels that its constitutional rights have been violated.

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3. Arbitration in Ecuador and annulment of awards under COGEP

3.1 Domestic arbitration procedure

Arbitration in Ecuador is the second option available to foreign entities as a dispute resolution mechanism. In the last decade, the level of arbitration in the country has achieved important progress. Practitioners have willfully accepted this method of dispute resolution, and polished it.

Arbitrators are generally respected individuals from the Ecuadorian legal community, the Arbitration and Mediation Law (LAM) has been in force since 1997 and it has international standards, and the dispute resolution centers have acquired importance, especially the Arbitration and Mediation Center of the Quito Chamber of Commerce, the Arbitration Center of the Ecuadorian-American Chamber of Commerce, and the Arbitration Center of the Guayaquil Chamber of Commerce.

Another available option is domestic arbitration, but appointing international arbitrators to resolve the procedure. The nationality of the arbitrators does not necessarily make the procedure international.

All of these features and not needing a recognition procedure to enforce the award make domestic arbitration an interesting alternative for international entities. However, domestic awards are subject to annulment before the Ecuadorian courts.

3.2 Annulment of awards

The annulment procedure for domestic awards in Ecuador is regulated under article 31 of the Arbitration and Mediation Law. The new COGEP has not modified this procedure nor has it regulated the annulment of awards in any relevant way –ob-

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viously some of its procedural mandates will influence how the annulment procedure is conducted– but nothing beyond this.

Article 31 of the LAM limits to five the causes for annulment which refer to relevant procedural mistakes constituting good cause to void the award:

a) When the defendant was not legally summoned and the trial continued and ended without the defendant's presence. Lack of subpoena must, in practice, have prevented the defendant to put forward his exceptions or enforce his rights; additionally, the defendant must have pointed out this procedural failure when first intervening in the dispute;
b) When the parties were not notified with the court's orders and this prevented or limited their right of defense;
c) When a party was not summoned or was not served the summons, or even after the party was summoned it did not have the opportunity to present evidence, despite the existence of facts to be justified;
d) When the award deals with matters not submitted to arbitration or grants them beyond what was claimed; or,
e) When the procedures provided by this Law or by the parties to appoint arbitrators or to constitute the arbitral tribunal have been violated.

Theoretically, the annulment proceeding should not get into the substance of the original dispute[15]. The nature of annulment has been clearly defined and limited both by doctrine[16] and by judicial precedents[17].

The President of the Provincial Court is the judge who hears annulment disputes. The annulment instance should take no more than 30 days, but in our experience this period has never been accomplished.

15. F. Albuja Guarderas, "La acción de nulidad de un laudo arbitral: ¿un proceso de conocimiento?", "Arbitraje en Ecuador: Desarrollo Jurisprudencial y Reformas", *Revista Ecuatoriana de Arbitraje*, No. 6, 2014, p. 271.
16. J. Marchán, "La aplicación de la acción de nulidad de laudos arbitrales en el Ecuador", *Revista Ecuatoriana de Arbitraje*, No. 3, 2011, pp. 17-30.
17. Provincial Court of Pichincha, *Quasar Nautica Expeditions S.A. c. Ocean Adventures S.A.*, Decision, 25/11/2009, p. 12.

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3.2.1 Annulment process

On March 22, 2017, the plenary National Court of Justice issued Resolution 08-2017 establishing "Rules of procedure for annulment of an arbitral award." The purpose of this initiative, in accordance with the preamble to the Resolution, is to adapt the rules for annulment proceedings established in article 31 of the Arbitration and Mediation Law to the provisions of the General Organic Code of Processes[18].

Articles 1.1 and 1.2 of the Resolution are a compilation of what is already established in article 31 of the Arbitration and Mediation Law, stating that an action for nullity of an arbitral award must be submitted to the arbitral tribunal that issued it within ten days after it is rendered final, and that the tribunal, within a three-day term, must refer the case to the President of the Provincial Court that is competent by reason of territory.

Article 1.3 gives the President of the Provincial Court the possibility of rejecting the action in the event that the plaintiff did not submit it within the aforementioned ten-day term. This is somewhat contradictory to what is established in article 31 of the LAM since the power to admit the action –at least with respect to temporality– in principle would fall on the arbitral tribunal before which it is presented.

In a clear attempt to accelerate the process, article 1.4 states that in order to resolve the annulment action, the President of the respective Provincial Court must rule within thirty days from the date of the action in a single hearing and must follow the guidelines established in article 79 of COGEP in application of article 2 of the Resolution - when evidence will be produced.

Most likely, in the same procedural order that summons the parties to the hearing, the President will ask the defendant to answer the annulment action within five days. It would be absurd to initiate the hearing without the respondent having answered

18. J. Jaramillo, "¿Larga vida al arbitraje? Los efectos de la Resolución 08-2017 de la Corte Nacional de Justicia", 13/04/2017, «https://goo.gl/19AtV6».

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the claim and after the plaintiff has had the opportunity to review the answer. Pursuant to article 3 of the Resolution, at the end of the hearing the President of the Provincial Court must rule orally and notify the reasoned judgment in writing within ten days.

Although determination of the thirty-day term for the aforementioned single hearing would seem to expedite the process of annulment, it could be the case –as it turns out to be a repeated practice in the process of applying COGEP– that the judge will decide to suspend the hearing and to reinstall it later, either because of the need to produce more evidence or to think in more detail before the corresponding ruling is issued.

3.2.2 Appeals and revisions of annulment decisions

Lastly, and with the same intention of expediting the annulment process, article 4 of the Resolution establishes that "there will be no recourse for the judgment passed by the President of the Provincial Court, except horizontal recourses for clarification or expansion".

In this way, the National Court of Justice seems to put an end to the long annulment processes in which the party for whom the decision was not favorable raised the vertical recourses of appeal and cassation. However, it is necessary to note that this provision is contrary to the criterion stated by the Constitutional Court which, through Judgment No. 325-15-SEP-CC, said that the nullity action is a process to decide a legal issue subject to the remedies of nullity s and cassation.

However, the Resolution makes no reference to the AEP where, according to the criterion expressed by the Constitutional Court, it is up to the plaintiff to have exhausted all remedies available to the ordinary courts. In application of the Resolution, the AEP would be admissible once the decision of the President of the Provincial Court resolving the annulment action is settled and enforced. On the other hand, it should be remembered that, ac-

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cording to the criterion of the Constitutional Court, the AEP may also be presented directly against the arbitral award in such cases in which it was raised to protect constitutional rights that cannot be protected through annulment.

In conclusion, the application of the Resolution, in principle, would have a positive effect on the agility in the process of annulment of arbitration awards without prejudice to the practical complications that its application, especially in relation to COGEP, can generate.

4. Litigation in Ecuador

The disadvantages of litigating in Ecuador have already been discussed such as the long duration of proceedings, lack of predictability of the rulings, lack of expertise and confidentiality, amongst others. Nonetheless, there are also some advantages of litigating under the ordinary justice in Ecuador. This is especially true in two instances: **(i)** when claims are small and not worth the higher costs of arbitration, and **(ii)** most importantly, it is very convenient to litigate in Ecuador when there are guarantees that can be directly executed.

According to article 336 and following articles of COGEP, guarantees such as pledges enjoy a special summary procedure in Ecuador, since these documents are considered full proof of the debt. Thus, a pledge that has been duly registered, if applicable, will be considered "*título de ejecución*" and the rights granted by a mortgage contract can be claimed directly through execution with no need of a previous declaratory proceeding.

The debtor may only oppose the writ of execution within a period of five days for the following reasons: payment or payment in kind, compromise, remission, novation, confusion, compensation or loss or destruction of the thing owed.

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The cause invoked must be duly justified. The opposition does not suspend the execution and will be resolved at the executory proceeding. If the debtor fails to comply with the obligation, the judge will order the seizure of property belonging to the debtor.

In the case of real estate declared by court rulings, the judge will declare the embargo and will register it. It will then call an independent expert to assess the value of the real estate and will sell it in a public auction. The creditor will be paid with the yield of the auction.

This process should not be lengthy and the causes for opposition available to the debtor are very limited. It should not take longer than a few months, although we have seen processes that last longer.

Thus, domestic litigation could be a better solution than arbitration in the specific case of contracts guaranteed by mortgages and pledges, since it is possible to directly execute them, while in arbitration –both domestic and even more in international arbitration– there is first a procedure that homologates the award, followed by a second procedure for execution.

4.1 When the counterparty is the Ecuadorian State or a public entity

A word must be said about negotiating dispute resolution forums when the counter-party is the State or a public entity since the scenario varies considerably from the commercial perspective presented in this paper.

Article 422 of the Ecuadorian Constitution[19] prohibits Ecuador from entering into arbitration clauses in commercial cases

19. Ecuadorian Constitution, Art. 422: International treaties or instruments where the Ecuadorian State yields its sovereign jurisdiction to international arbitration entities in contractual or commercial disputes between the State and private natural or juridical persons cannot be entered into. The international

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when these imply yielding the State's sovereign jurisdiction to international arbitration entities.

This rule has two exceptions; the first is included in the same article which determines that the State may enter into arbitration clauses in treaties with other Latin American countries if the arbitration is conducted in a regional center. The second can be inferred from the fact that the article only mentions commercial arbitrations where sovereignty may be ceded to third parties (we believe targeting the BIT clauses) and does not mention other types of arbitrations such as investment disputes. Further, the new Public-Private Partnership Law also authorizes the State to arbitrate at a regional level[20].

4.1.1 Requirement of COGEP's Article 104 regarding the execution of awards rendered against the State:

The last paragraph of article 104 establishes:

> For the purpose of recognizing judgments and arbitration awards *against the State, since they are not commercial matters, it must also be demonstrated that they do not contravene the provisions of the Constitution and the law*[21], and that they are in accordance with the international treaties and conventions in force. In the absence of international treaties and conventions, they shall be enforced if they appear in the respective warrant or the national law of the country of origin recognizes its effectiveness and validity (Free translation, emphasis added).

This peculiarity regarding the enforcement of international awards rendered against the State provides that the applicant must prove that the decision which it is seeking to homologate

treaties and instruments that provide for the settlement of disputes between States and citizens in Latin America by regional arbitration entities or by jurisdictional organizations designated by the signatory countries are exempt from this prohibition. Judges of States which as such or their nationals are part of the dispute cannot intervene. In the case of disputes involving the foreign debt, the Ecuadorian State will promote arbitration solutions on the basis of the origin of the debt and subject to the principles of transparency, equity and international justice.

20. Organic Law of Incentives for Public Private Associations, Art. 20, RO Sup. 652, 18/12/2015.
21. In this case the reference to the law should be construed as Ecuadorian law.

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does not contravene the provisions of the Constitution, the law and international treaties, making it much more complicated for awards rendered against the State to be recognized in Ecuador.

4.1.2 Does the last requirement of COGEP article 104 violate the NYC?

In our opinion, the requisite that an international award should comply with the Ecuadorian Constitution and laws is contrary to the New York Convention[22]. However, we know of no proceeding in which the competent forum has declared this law to be invalid. Of course, if a judge finds that there is a conflict between the NYC and COGEP, the NYC should prevail.

The aim of the NYC is to forbid double exequatur of awards. In principle, the New York Convention is hierarchically superior to COGEP. Article 18(4) of the Civil Code establishes the principle of systematic interpretation of the law whereby the legal system must be interpreted in its context so that there should be correspondence and harmony between them. That is, giving an effect to all provisions, preferring their applicability to their ineffectiveness. The norm states:

> The context of the law will serve to illustrate the meaning of each of its parts, so that there is correspondence and harmony between them. The dark passages of a law can be illustrated by other laws, particularly if they deal with the same subject (free translation).

In that sense, COGEP provisions should be understood in the context of the entire Ecuadorian legal system, which includes the NYC. Therefore, an interpretation in which COGEP provisions are consistent with those of the NYC should be preferred. Otherwise, or in the event of impossibility, in accordance with the principle of the prevalence's of the hierarchically superior rule established in article 425 of the Constitution, the NYC should prevail. In this regard, it is necessary to analyze the principles of in-

22. Á. Galindo & H. García, N. 2, p. 75.

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terpretation of the New York Convention in the light of COGEP provisions.

Additionally, even if the court of recognition would homologate the award, it is extremely difficult in Ecuador to judicially execute an award against the State.

4.1.3 Difficulties for the execution of awards in the case of the State/public entities

Ecuadorian law currently provides that domestic funds deposited into the Unified Treasury Account and funds deposited abroad into accounts maintained by the Central Bank of Ecuador may not be seized and may not be the subject to any collection action or preventive or injunctive measures.

Further, Article 45 of the Monetary Code establishes:

> Article 45.- Special Accounts. The Monetary and Financial Policy and Regulation Board may authorize entities other than those making up the General State Budget to create special accounts within the National Treasury Single Current Account. The special accounts of all national public companies are part of the National Treasury Single Account" (free translation).

Nor would it be possible to execute judgments against the accounts of State institutions, including public enterprises:

> Article 46.- Impossibility to seize. The deposits of public entities and the resources of the Deposit Insurance Corporation, the Liquidity Fund and the Private Insurance Fund in the Central Bank of Ecuador or in their accounts, both in the country and abroad, cannot be seized, they enjoy sovereign immunity and cannot be subject to any type of coercion or preventive or precautionary measure (free translation).

Nevertheless, there are, at least theoretically, two other options that are available to a creditor to obtain payment of an in-

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ternational award: **(a)** the creditor could seize assets that are not protected from seizure under Ecuadorian law[23], and **(b)** the President and the National Assembly could include the value of the potential award in the national budget of the following year.

Several laws currently in force in Ecuador prohibit seizure of funds from the Ecuadorian National Unified Treasury Account (Treasury Funds), including Article 40 of the Monetary Code cited above.

Article 136 of the Organic Monetary and Financial Code (Monetary Code) which took effect on September 12, 2014, states that "property and funds which make up the foreign assets of the Central Bank of Ecuador may not be seized, and they enjoy sovereign immunity" and cannot be "subject to any type of collection action, preventative or injunctive measures". Finally, Article 1634 of the Civil Code lists property that is not subject to seizure, which includes "assets that cannot be attached pursuant to special laws".

We have found one case in which a civil court in Pichincha granted a request to seize Unified Treasury Account funds in order to satisfy a judgment of an arbitral tribunal against the Ministry of Agriculture and in favor of a private company[24].

In this case, the private company brought a series of arbitration proceedings against the Ministry of Agriculture, arguing that the ministry owed it money based on previously unpaid invoices. In the award enforcement proceedings, the civil court of Pichincha noted that the Civil Code at the time did not preclude the seizure of assets from the Unified National Treasury Account and granted its request to embargo both Treasury Funds as well as fiscal assets belonging to the Ministry.

23. Such as those that do not pertain generally to the public. These assets could include both real property and movable property used by the various ministries of the national government (e.g., real estate, vehicles, office supplies, etc.).
24. See, Twenty Third Civil Court of Pichincha, *Natural Resources Limited vs. Ministerio de Agricultura, Ganadería, Acuacultura y Pesca*, Trial No. 0981-2003.

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It should be noted, however, that this case was adjudicated in 2009, prior to the promulgation of the COPFP in 2010 and the Monetary Code in 2014. Thus, it appears as though this outcome would be barred by the terms of that statute if it were tried in the present day.

Under Ecuadorian law, it is possible for a creditor to seize (commercial) assets of the State pursuant to a judgment. It is debatable if this kind of assets falls outside the scope of those that are specifically protected from seizure under the COPFP and the Monetary Code. Article 604 of the Civil Code defines fiscal/commercial assets as those that are not part of the public domain. Assets in the public domain are those that "pertain to the entire nation" and that may be generally used by all citizens, such as roads, bridges, and beaches. Commercial assets, by contrast, are those that do not pertain generally to the public.

We believe it would be difficult for the judge to proceed with the seizure of commercial assets of the Republic of Ecuador. This is especially true due to the wording of Article 136 of the Monetary Code:

> Article 136.- Impossibility to seize. The assets and resources that make up the external assets of the Central Bank of Ecuador cannot be seized, they enjoy sovereign immunity, cannot be subject to any type of compulsion, preventive or precautionary measure or execution, and can only be applied for the purposes set forth in this Code.

The second way in which a creditor could execute its award is through a specific allocation of that payment in its annual budget. Article 170 of the COPFP (the same statute that prohibits the embargo of Treasury Funds discussed above) provides that "State funds" may be disbursed pursuant to "final judgments" and financed through specific ministerial budgets. Article 170 states:

> Public sector entities and agencies shall comply immediately with final judgments which have become *res iudicata*, and if

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they imply disbursement of funds; such obligation shall be financed against the budgetary allocations of the respective entity or agency for which, if necessary, the respective amendments shall be made in non-permanent expenses (free translation).

These laws do not expressly prohibit payment of Treasury Funds that are lawfully approved for disbursement in order to satisfy an embargo order. But there is no way to control that these obligations are actually included in the State budget and also if the State or public entities do actually pay.

5. Conclusion

All the forums studied in this paper yield advantages and disadvantages regarding the convenience for an international party when contracting with an Ecuadorian counter-party. International arbitration lost some of its attractiveness due to the new provisions of COGEP regarding recognition of foreign awards in Ecuador. However, international arbitration has not ceased to be a valid alternative, as the new process does not hinder the execution of foreign awards; it only introduces a new longer procedure. The same cannot be said regarding international arbitration against the State which now is extremely more complicated. Finally, foreign courts, domestic arbitration and domestic litigation are other alternatives that, depending on the circumstances, should be considered when including a dispute resolution clause in a contract, and should be worth a second look.

All these considerations should be balanced at the time of choosing a forum for a dispute with the State.