



**COUNTRY
COMPARATIVE
GUIDES 2023**

The Legal 500 Country Comparative Guides

Ecuador

INTERNATIONAL ARBITRATION

Contributor

Robalino



Javier Robalino

Partner | jrobalino@robalinolaw.com

Cristina Viteri

Of Counsel | cviteri@robalinolaw.com

María Verónica Arroyo

Senior Associate | mvarroyo@robalinolaw.com

Michelle Vasco

Senior Associate | mvasco@robalinolaw.com

This country-specific Q&A provides an overview of international arbitration laws and regulations applicable in Ecuador.

For a full list of jurisdictional Q&As visit legal500.com/guides

ECUADOR

INTERNATIONAL ARBITRATION



1. What legislation applies to arbitration in your country? Are there any mandatory laws?

Yes, there are mandatory laws applicable to arbitration. Specifically, Ecuadorian arbitration is ruled under the Constitution and the Arbitration and Mediation Law (Ley de Arbitraje y Mediación) (hereinafter “LAM”) and its Rules (Reglamento de la Ley de Arbitraje y Mediación) (hereinafter “LAM Rules”). Nonetheless, those provisions apply only to (i) domestic arbitrations and (ii) execution of foreign awards. There is no specific legislation applicable to international arbitration, as there is, for example, in Chile.

On international arbitration, Ecuador has ratified the New York Convention. In investment arbitration, Ecuador is part of the CIADI convention.

2. Is your country a signatory to the New York Convention? Are there any reservations to the general obligations of the Convention?

Yes, Ecuador is member of the New York Convention.

Yes, there is a reservation regarding the exceptions to the enforcement of an award. Besides the requirements set forth in article V (2) of the aforesaid convention, Ecuador requires the awards to be of commercial nature to apply the New York Convention.

3. What other arbitration-related treaties and conventions is your country a party to?

Ecuador is a state-member of the following arbitration-related treaties:

- ICSID Convention (2021)
- General Treaty of Inter-American Arbitration (1929)
- Inter-American Convention on International

Commercial Arbitration (1975)

4. Is the law governing international arbitration in your country based on the UNCITRAL Model Law? Are there significant differences between the two?

Ecuador has no legislation regarding international arbitration, besides international treaties. Article 41 of the LAM explicitly provides that: “[i]nternational arbitration shall be regulated by the treaties, conventions, protocols and other acts of international law signed and ratified by Ecuador”. Also, there is no local legislation that is entirely based on the UNCITRAL Model Law. Nonetheless, the local LAM has incorporated essential principles from the Model Law.

5. Are there any impending plans to reform the arbitration laws in your country?

As of today, there is no relevant or serious intent to amend, overturn or repeal the LAM nor its Rules. There are, however, some detractors from the concept of arbitration and therefore from the related laws. These stands generally come from political associations against international arbitration in broad terms.

Nonetheless, on July 28, 2023, the Ecuadorian Constitutional Court, in the case 2-23-TI, regarding the “Trade Association Agreement between the Republic of Ecuador and the Republic of Costa Rica” declared that the Articles 11.20, and 15.20 to 15.35, and their respective Annexes (Chapter 15), were incompatible with the content of the Article 422 of Ecuador’s Constitution. Since in this articles an arbitration clause is established whereby Ecuador cedes its national jurisdiction in favor of international arbitration bodies, such as ICSID, this being against what is determined in article 422, in which it is established that The Ecuadorian State may not enter into international treaties or instruments where sovereign jurisdiction is ceded to international arbitration bodies, in contractual or commercial disputes between the contractual or

commercial disputes between the State and private natural or juridical persons.

6. What arbitral institutions (if any) exist in your country? When were their rules last amended? Are any amendments being considered?

There are several private arbitral institutions in Ecuador. The most prestigious and renowned is the Quito Chamber of Commerce (CAM CCQ), whose arbitrators are some of the most notable lawyers in the country. There are other fine institutions, like the Ecuadorian American Chamber of Commerce (AMCHAM) or the Guayaquil Chamber of Commerce (CAC CCG). The details of their Rules and last amendments are as follows:

- CAM CCQ: On 26 de July de 2023. A new bylaw was approved related to new Regulations of Operation of the Arbitration and Mediation Center of the Quito Chamber of Commerce. In this bylaw there are new rules regarding Express arbitration, statutory arbitration, abbreviated arbitration, social arbitration, and international arbitration were added..
- AMCHAM: July 20, 2021. Addition of rules regarding emergency arbitration.
- CAC CCG: July 5th, 2022. No significant amendments are considered.

7. Is there a specialist arbitration court in your country?

No.

8. What are the validity requirements for an arbitration agreement under the laws of your country?

In general terms, the validity requirements for an arbitration agreement are the same as the requirements for any contract. Those requirements can be found on articles 1461 and subsequent of the Ecuadorian Civil Code, mainly, the capacity of a party to be bound to contractual obligations. The LAM also provides specific requirements to arbitral agreements on articles 4 and 5. Parties must be capable of compromising and the rights discussed in arbitration must be negotiable, usually rights of contractual, economical, or commercial nature. In addition, the arbitration clause must be in written form.

There are additional requirements if a party to the

arbitration clause is the State or a public institution. First, the arbitration clause should be authorized by the General Attorney's Office (Procuraduría General del Estado). Second, only contractual controversies may be subject to arbitration. Third, the arbitration clause shall provide the method for the appointment of arbitrators. Fourth, the arbitration agreement must be signed by the highest authority of the public institution, with adequate capacities thereto.

9. Are arbitration clauses considered separable from the main contract?

Yes. By virtue of the principle of separability of the arbitration clause, the annulment of the contract does not cause the annulment of the arbitration clause, nor vice versa. This principle is recognized in article 5 of the LAM, as follows: "the nullity of a contract shall not affect the validity of the arbitration clause". Ecuadorian courts have understood by the principle of separability not only that arbitration clause may survive defects of nullity, but also that, even if a contract is void, the disputes arising from it shall be ruled under arbitration.

10. Do the courts of your country apply a validation principle under which an arbitration agreement should be considered valid and enforceable if it would be so considered under at least one of the national laws potentially applicable to it?

No.

11. Is there anything particular to note in your jurisdiction with regard to multi-party or multi-contract arbitration?

No.

12. In what instances can third parties or non-signatories be bound by an arbitration agreement? Are there any recent court decisions on these issues?

Ecuadorian legislation and jurisprudence accept non-signatory parties. In specific, article 6 of the LAM Rules provides that an arbitration clause may be extended to a non-signatory party when:

- A party has actively participated in the negotiation, execution, or termination of the

transaction.

- A party later became holder of rights or obligations from the contract subject to arbitration, such as heirs, successors, or assignees of another party.
- A public entity is not party of a contract but has executed administrative acts related to the controversy.

Although the LAM Rules provide only three scenarios, the arbitral jurisprudence has developed the principle and extended the cases when a third party can be bound to arbitration. The cases *AUTORIDAD PORTUARIA DE MANTA V. TERMINALES INTERNACIONALES DE ECUADOR* (091-13), *ANTILLEAN FINANCE COMPANY B.V. V. VARADERO MARIDUEÑA* (032-16), *FIDEICOMISO MERCANTIL BASA V. BANCO AMAZONAS*, and *CÉSAR EDUARDO JERVES V. URBANOV* (019-17) have added scenarios in which non-signatory parties can be bound by the arbitration clause, namely:

- A party is warrantor of a contractual party.
- A party owns a significant share of a contractor, and exercised control over it in the execution of the contract.

13. Are any types of dispute considered non-arbitrable? Has there been any evolution in this regard in recent years?

Yes. As a rule of thumb, only negotiable rights are subject to arbitration, i.e., contractual, economic, or commercial rights. Article 1 of the LAM and 190 of the Ecuadorian Constitution require the “negotiability” of the rights discussed in arbitration proceedings. Therefore, when fundamental rights are at stake, like human or constitutional rights, arbitration may not proceed. The Ecuadorian legislation provides other scenarios in which arbitration is not applicable, such as controversies regarding tax, labor, and antitrust matters.

Finally, there is a discussion regarding the arbitrability of administrative acts, which are official actions of the public administration. State entities commonly claim that administrative acts are not arbitrable, based on the argument that an arbitral tribunal, being a private authority, has no capacity nor jurisdiction regarding the acts of the State, as they have public effects. Nonetheless, the recently enforced LAM Rules, i.e., article 4(3), specifically allows the arbitration of administrative acts.

14. Are there any recent court decisions in

your country concerning the choice of law applicable to an arbitration agreement where no such law has been specified by the Parties?

No.

15. How is the law applicable to the substance determined? Is there a specific set of choice of law rules in your country?

The law applicable to the substance in domestic arbitrations, as rule of thumb, is the Ecuadorian Law. Nonetheless, parties may agree upon a specific law to rule the substance of a contractual relation.

16. In your country, are there any restrictions in the appointment of arbitrators?

Yes. The tribunal must be appointed according to the methods provided by the LAM only, which include common agreement by both parties, draw, or appointment by the arbitration center. Also, arbitrators shall always be impartial and have no conflict of interest with the parties, pursuant to article 22 of the Ecuadorian Procedural Code.

17. Are there any default requirements as to the selection of a tribunal?

No.

18. Can the local courts intervene in the selection of arbitrators? If so, how?

No.

19. Can the appointment of an arbitrator be challenged? What are the grounds for such challenge? What is the procedure for such challenge?

Yes. Article 21 of the LAM regulates the challenge process. According to the mentioned provision, arbitrators have the same impediments as judges, and a party may challenge one or all the members of the tribunal on that basis. The grounds to challenge an arbitrator are set forth in article 22 of the Ecuadorian Procedural Code, some of them:

- Being a party to the dispute or is married to a party.
- He is or has been counsel or legal representative of any of the parties.
- Being a relative up to the fourth degree of consanguinity or second degree of affinity to one of the parties, or to the attorney-in-fact (or equivalent) of one of the parties.
- Expressing opinion or advice regarding the controversy.
- Having himself, or any of his relatives up to the fourth degree of consanguinity or second degree of affinity, a legal process against any of the parties.
- Receiving contributions, goods, securities, or services from any of the parties.
- Having any outstanding obligation with any of the parties or their counsels.
- Having intimate friendship or manifest enmity with any of the parties or their counsels.
- Having personal interest in the process because it concerns his or her business.

20. Have there been any recent developments concerning the duty of independence and impartiality of the arbitrators

No, there are not provisions contemplated on Ecuadorian's *lex arbitri*. However, article 97 of the Regulations of Operation of the Arbitration and Mediation Center of the Quito Chamber of Commerce establish that the appointed arbitrator shall sign a declaration of independence and impartiality regarding the parties and also the parties' financial backers, if it is applicable.

21. What happens in the case of a truncated tribunal? Is the tribunal able to continue with the proceedings?

By rule of law, article 17 of LAM provides that an arbitral tribunal shall have at least one substitute arbitrator. Thus, in case an arbitrator refuses to participate in the proceeding, there is always a substitute.

22. Are arbitrators immune from liability?

Neither arbitrators, nor centers, are immune from liabilities, according to article 7 of the LAM Rules. Nonetheless, this liability is only limited to gross negligence. Another scenario for liability is provided in article 12 of the same Rules, which is when the tribunal issues the award after the deadline thereto.

23. Is the principle of competence-competence recognized in your country?

Yes. Article 7 of the LAM provides that when parties have arranged an arbitration clause, jurisdictional courts shall not interfere with the controversy, even if there is a doubt regarding the jurisdiction of the arbitral tribunal. Further, article 22 of the LAM expressly recognizes that only the arbitration tribunal shall decide upon its own jurisdiction.

24. What is the approach of local courts towards a party commencing litigation in apparent breach of an arbitration agreement?

If a party to an arbitration clause makes a submission before an ordinary court, regarding the same matter of the clause, the defendant must raise the issue as an objection to the court's jurisdiction. However, if the defendant remains silent and takes part in the proceeding, the agreement to arbitrate is understood to be waived pursuant to article 8 of the LAM.

25. What happens when a respondent fails to participate in the arbitration? Can the local courts compel participation?

If the respondent fails to participate in an arbitration proceeding, the arbitral tribunal shall understand an outright rejection of all claims. LAM does not foresee other consequences if the defendant fails to attend the hearings. Thus, if the defendant fails to appear in hearings, that party loses its opportunity to present its case and its defense, but this circumstance does not block or hinder the process.

26. Can third parties voluntarily join arbitration proceedings? If all parties agree to the intervention, is the tribunal bound by this agreement? If all parties do not agree to the intervention, can the tribunal allow for it?

Arbitration is governed by the principle of autonomy of the parties' will; therefore, the consent of both parties would be required for the third party to participate in the procedure. If both parties agree on the participation of the third party, the tribunal must give way to it.

27. What interim measures are available? Will local courts issue interim measures pending the constitution of the tribunal?

There is room for improvement in the field of interim measures in the Ecuadorian arbitration practice. Although article 9 of the LAM allows arbitrators to order interim measures subject to the parties' agreement thereabout in the arbitration clause, some public institutions do not enforce such orders. The judicial system's intervention is often needed to enforce interim measures. Then, courts usually refuse to issue interim measures before the constitution of the arbitral tribunal.

However, the LAM Rules has established an Emergency Arbitration proceeding, in which one parties can request the interim measures of article 8 of the LAM Rules.

28. Are anti-suit and/or anti-arbitration injunctions available and enforceable in your country?

Anti-suit or anti-arbitration injunctions are not specifically regulated in Ecuador. In many cases, the parties enter into a private agreement in which they decide not to go to court.

29. Are there particular rules governing evidentiary matters in arbitration? Will the local courts in your jurisdiction play any role in the obtaining of evidence? Can local courts compel witnesses to participate in arbitration proceedings?

No. Arbitrators themselves cannot order witness participation or any other measures related to evidentiary matters because they cannot order coercive measures, due to their status of private authority.

Nevertheless, the principle of party autonomy allows the parties to an arbitration to determine the rules governing evidentiary matters. However, in several cases, the procedural Ecuadorian law has been used to resolve doubts regarding the taking of evidence. The accuracy of this practice is under discussion. Although there is no specific prohibition thereabout, there is no precedent available on the interaction between arbitration and ordinary justice regarding the intervention of local courts in evidentiary matters.

30. What ethical codes and other

professional standards, if any, apply to counsel and arbitrators conducting proceedings in your country?

Counsel representation is regulated in many local laws and resolutions which address privilege, fees calculation, ethical guidelines, conflicts of interest, among others. For instance, the Lawyers Federation Law and the Organic Code of the Judicial Function regulate the behavior expected from a counsel. These regulations also apply to the arbitration community.

31. In your country, are there any rules with respect to the confidentiality of arbitration proceedings?

Yes. According to article 34 of the LAM, parties are allowed to agree on confidentiality. Arbitration centers keep confidential files. Awards can be published only for academic purposes and Parties must be duly anonymised.

32. How are the costs of arbitration proceedings estimated and allocated?

N/A

33. Can pre- and post-award interest be included on the principal claim and costs incurred?

Pre-award interests are as usual included in the claim. However, regarding post-award interest, there is a doctrinal discussion as to whether its award constitutes an *ultra petita* case. However, case law has historically rejected this argument.

34. What legal requirements are there in your country for the recognition and enforcement of an award? Is there a requirement that the award be reasoned, i.e. substantiated and motivated?

The enforcement of both local and international awards must be carried out by judicial courts. In the case of international awards, local legislation contemplated a previous step: its recognition. However, this has been recently modified by the LAM Rules, which seek that the award is enforced as quickly as possible and prevents the process from being obstructed by non-exceptional issues. Therefore, a foreign award, for enforcement purposes, is equivalent to a local award.

35. What is the estimated timeframe for the recognition and enforcement of an award? May a party bring a motion for the recognition and enforcement of an award on an ex parte basis?

The enforcement of the award could be concluded within roughly a year. The Procedural Organic Code determines that the arbitration award is an execution title that can be enforced by execution proceeding upon request of a party.

36. Does the arbitration law of your country provide a different standard of review for recognition and enforcement of a foreign award compared with a domestic award?

There are minor details that differ between the recognition and enforcement of foreign and national awards, for instance, a translation is needed if the award was issued in a foreign language.

37. Does the law impose limits on the available remedies? Are some remedies not enforceable by the local courts

Remedies may be enforced by local courts to the extent that they are consistent with Ecuadorian law.

38. Can arbitration awards be appealed or challenged in local courts? What are the grounds and procedure?

No, but they may be annulled or rescinded in specific cases set forth in article 31 of the LAM. In Ecuador, the possibilities to appeal or challenge arbitral awards are limited. The lack of an appealing instance reflects the nature of arbitration as an alternative dispute resolution method. Hence, the voluntary submission of the parties to arbitration implies accepting its differences with judiciary proceedings. The Constitutional Court of Ecuador has stated that "there are processes in which the law expressly does not provide for the possibility of filing appeals, which does not mean a violation of the constitutional right to effective judicial protection, but on the contrary, implies access to justice under a framework of legal certainty" (Case No. 007-16-SCN-CC), referring specifically to the case of arbitration awards.

39. Can the parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitration clause)?

As mentioned above, awards cannot be appealed or challenged. However, it is a recurrent discussion whether the waiver of the action for annulment of the award is possible, since in principle it does not contravene any provision of the Ecuadorian legal system.

40. In what instances can third parties or non-signatories be bound by an award? To what extent might a third party challenge the recognition of an award?

Arbitral jurisprudence has recognized non-signatory parties in the issuance of awards. However, it is important to mention that the standard of proof to consider a third party as a real "party" to a disputed legal relationship is quite high. In the enforcement phase, those against whom the award is to be enforced may submit their observations in very few cases expressly set forth in the law.

41. Have there been any recent court decisions in your jurisdiction considering third party funding in connection with arbitration proceedings?

TPF is not regulated in Ecuador *lex arbitri*, neither is it prohibited. Therefore, the legal system is friendly with this figure since it does not go against it. It would be beneficial if TPF was regulated. For example, under Ecuadorian law, a funder cannot be ordered to pay costs, since it is not a party to the arbitration, as a non-signatory party would be.

Nevertheless, in article 117 of the Regulations of Operation of the Arbitration and Mediation Center of the Quito Chamber of Commerce (QCC) some provisions were made regarding to TPF.

42. Is emergency arbitrator relief available in your country? Are decisions made by emergency arbitrators readily enforceable?

Yes. Prior to the initiation of the arbitration process, either party may request urgent interim measures, which cannot wait for the constitution of an arbitral tribunal, in order to avoid abusive enforcement, maintain the status quo, protect information or preserve evidence.

The emergency arbitrator is appointed by the Arbitration Centers to issue interim measures to prevent such situations.

43. Are there arbitral laws or arbitration institutional rules in your country providing for simplified or expedited procedures for claims under a certain value? Are they often used?

As part of its latest reform, the Quito Chamber of Commerce implemented abbreviated arbitration. This is a simplified procedure that allows the parties to access arbitration with a reduction of time and costs. To access this type of arbitration, the amount of the claim and the eventual counterclaim must not exceed two hundred thousand dollars (USD \$200.000), or if the parties agreed beforehand.

44. Is diversity in the choice of arbitrators and counsel (e.g. gender, age, origin) actively promoted in your country? If so, how?

Problems related to inequality are not foreign to Ecuadorian arbitration. However, in the private arena, steps are being taken to combat this common nuisance. For example, programs are being developed that catalogue arbitrators under objective parameters so that they can be fairly chosen by users of arbitration centers.

45. Have there been any recent court decisions in your country considering the setting aside of an award that has been enforced in another jurisdiction or vice versa?

No. According to article 15 of the LAM Rules, once an award has res judicata effect, it shall be enforceable in Ecuador, regardless it being foreign or any additional considerations. However, despite there are no additional requirements or restrictions regarding the enforcement, the interested party may raise the argument in the enforcement proceeding.

46. Have there been any recent court decisions in your country considering the issue of corruption? What standard do local courts apply for proving of corruption? Which party bears the burden of proving

corruption?

Corruption is considered a crime in Ecuador and is therefore prosecuted through criminal proceedings. The general rule in Ecuador is that defendants have a presumption of innocence, so it is up to the prosecutor to prove whether corruption actually existed. Since these are proceedings in which rights such as the right to freedom are at stake, the standard of proof is very high.

47. What measures, if any, have arbitral institutions in your country taken in response to the COVID-19 pandemic?

No significant measures have been taken regarding the pandemic by the arbitration community. Mostly, many audiences are now being held virtually.

48. Have arbitral institutions in your country implemented reforms towards greater use of technology and a more cost-effective conduct of arbitrations? Have there been any recent developments regarding virtual hearings?

In Ecuador, there is a relatively "recent" law named the Electronic Commerce, Signatures and Data Messages Law. Thanks to it, many official procedures that previously had no legal basis to be carried electronically have a sort of basis. Consequently, arbitration proceedings can validly implement technological facilities, such as receiving claims and their annexes, or making notifications by e-mail. On the other hand, and as mentioned above, many hearings are held by videoconference. In addition, Article 4 of the General Organic Code of Procedures states that hearings may be held by videoconference or other telematic means, and the judge may exceptionally, and only when justified by the need to be in person, deny the virtual appearance.

Likewise, on article 1 of the Regulations of Operation of the Arbitration and Mediation Center of the Quito Chamber of Commerce contemplates that proceedings being held in QCC might be handled virtually.

49. Have there been any recent developments in your jurisdiction with regard to disputes on climate change and/or human rights?

In Ecuador, unlike other countries in the world, nature is considered a subject of rights, so its legal framework is

very protectionist. There are many sanctions stipulated in the law. However, these rights are scarcely translated into legal actions and controversies related to climate change or human rights that reach local courts or other methods of dispute resolution, often reach a state of passivity.

50. Do the courts in your jurisdiction consider international economic sanctions as part of their international public policy? Have there been any recent decisions in your country considering the impact of

sanctions on international arbitration proceedings?

No.

51. Has your country implemented any rules or regulations regarding the use of artificial intelligence, generative artificial intelligence or large language models in the context of international arbitration?

No.

Contributors

Javier Robalino
Partner

jrobalino@robalinolaw.com



Cristina Viteri
Of Counsel

cviteri@robalinolaw.com



María Verónica Arroyo
Senior Associate

mvarroyo@robalinolaw.com



Michelle Vasco
Senior Associate

mvasco@robalinolaw.com

