



# Mediation in the Public Sector



By **Ximena Bustamante**

In countries with a continental European legal tradition, it is very rare for State institutions to undergo mediation procedures. And even if they do, it is highly unlikely that they would reach binding agreements that would resolve their disputes. Nonetheless, Ecuador is an exception. As a result of the enactment of the Arbitration and Mediation Law,

there has been a significant development of mediation in which a public entity intervenes. Two ingredients have combined to make this development happen. On the one hand, there are regulations that allow and guide the State to solve disputes through mediation, and on the other hand, there are procedures that take into account the nuances of having public officials sitting at the negotiation table, based on the principles of mediation confidentiality and legality of public law.

Ecuador has broad experience in mediation with the State. The Mediation Center of the State Attorney General's Office has witnessed a steady growth in these types of proceedings. In 2013, it received 421 requests for mediation involving a public entity. By 2019, that number approached 900 new requests. Mediations performed in other mediation centers throughout the country are not included in those numbers. It is important to note that mediation in Ecuador is voluntary; therefore, the fact that the parties choose this method demonstrates their confidence in it. Thus, both public entities and their private counterparts have succeeded in resolving cases that are extremely technical and complex, and involve significant amounts of money and widespread national interest.

Since public entities are subject to public law, they may perform only what is expressly permitted by law. Therefore, in Ecuador, public institutions are authorized by law to undergo mediation proceedings. Both the Arbitration and Mediation Law,<sup>1</sup> and the Organic Law of

the Attorney General's Office<sup>2</sup> grant general authorization. Other regulatory bodies allow mediation for specific matters,<sup>3</sup> the most relevant of which is perhaps the Organic Law of the National System of Public Procurement,<sup>4</sup> since it establishes mediation for the execution phase of a contract. In fact, most mediations involving a State institution concern disputes arising from the execution of an administrative contract.

However, legislation promoting public mediation is not enough to increase its usage. Designing a procedure that meets the specific needs of these type of cases is essential. To this end, two principles have played a key role in the resolution of these disputes: the principle of confidentiality in mediation and the rule of law of administrative law.

Although the principle of confidentiality is part of any mediation procedure, in public matters it has special significance. Disputes with the State usually generate a lot of apprehension among public officials because of the responsibilities that could be determined for past actions and for the decisions required to reach an agreement. Similar to other countries in the region, public officials in Ecuador are administratively, civilly and criminally liable for their actions and omissions.<sup>5</sup> Regarding public procurement, specifically, the contract manager and inspector are responsible for ensuring strict compliance with clauses, schedules, deadlines and costs.<sup>6</sup> In addition, in the event of a conflict, it is assumed that someone must have incurred in some kind of liability. This logic, which could be labeled as persecutory, can generate enormous fear in any individual, hence the natural reaction of public officials to defend themselves and remain in known and safe positions. This in turn limits communication with the other party and prevents them from searching for creative solutions. The private sector, on the other hand, fails to understand and resents this reaction. When this happens, mediation, through its principle of confidentiality, creates a safe space for exploration that protects public officials while they search for alternative paths to resolution. Nothing is legally binding until an agreement has been reached. In this safe space, it is

possible to understand the circumstances that created the conflict and craft a solution that is acceptable to all parties that does not bring any new responsibility for the public officials.

Preliminary agreements designed confidentially by the parties shall emerge pursuant to legal provisions framed within the Rule of Law.<sup>7</sup> Thus, the will of the public administration is formed through the corresponding technical, economic and legal reports. Therefore, in order to prepare the draft of the mediation settlement agreement containing the preliminary agreement, the entity is required to submit a technical report that supports the obligations and makes an economic settlement, if applicable; a legal report detailing possibility of settlement of the matter, the legitimacy of the agreement and its suitability for the interests of the entity and the State; and a financial report that certifies availability of funds in the event that the public entity assumes payment obligations.<sup>8</sup> After the parties approve the draft of the mediation settlement agreement, and provided that the agreement includes a transaction, the public entity shall request from the attorney general of the State delegation to settle if it lacks legal capacity, or the authorization to settle in the case of entities with legal capacity and the amount of the agreement is undetermined or exceeds \$20,000.<sup>9</sup> Once such delegation or authorization has been granted, the parties may sign the mediation settlement agreement, which shall become legally effective as an enforceable judgment and *res judicata*, and is subject to public scrutiny.

Mediation involving a State entity requires an understanding of the realities of public service, as well as the mediator's ability to constantly find solutions to the obstacles that continually arise

during negotiations. Although reaching an agreement with a public entity is complex, these mediations have been able to resolve issues of national interest, avoiding unnecessary judicial or arbitration proceedings, both nationally and internationally. The agreements reached have been subsequently endorsed by the controlling entities, the legal forum and the public opinion as agreements that effectively allow the resolution of complex disputes, saving costs and risks for both parties, in a transparent manner and within the framework of the law.

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1. Article 44 of the Mediation and Arbitration Law: "The State or Public Institutions may submit to mediation, through the person authorized to execute agreements on behalf of the corresponding institution."
2. Article 11 of the Organic Law of the Attorney General's Office: "Regarding arbitration and mediation: Public Sector Agencies and Entities may submit to (...) national or international mediation, in accordance with the provisions of the Mediation and Arbitration Law, or international instruments that grant authorities to them."
3. Examples include the Organic Law of Public Companies, which in its Article 11 urges managers to use alternative dispute resolution methods rather than court proceedings in all matters that may be settled outside of court; the Hydrocarbons Law (Article 10); and the Social Security Law (Article 302).
4. Article 104 of the Organic Law of the National System of Public Procurement: "Alternative Dispute Resolution Methods: If differences surface between the contracting parties, which are not resolved within the execution process, they may turn to mediation and arbitration processes to settle their differences, in accordance with the corresponding arbitration clause."
5. Article 40 of the Organic Law of the Office of the Comptroller General of the State provides: "Responsibility for actions or omissions: The authorities, executive officers, officials and other servants of State institutions shall act with the diligence and commitment they generally employ in the administration of their own business and activities, otherwise they shall be liable for their actions or omissions, in accordance with the provisions of this law."
6. Article 80 of the Organic Law of the National System of Public Procurement: "Responsible for Contract Management: The contract supervisor and auditor are responsible for taking all necessary measures for its proper execution, in strict compliance with its clauses, programs, schedules, timetables, deadlines and foreseen costs. This liability is administrative, civil and criminal as applicable."
7. Pursuant to article 226 of the Constitution of the Republic of Ecuador: "State institutions, its agencies or public officers and persons acting by virtue of State authority shall exercise only those powers and authorities attributed to them by the Constitution and the law."
8. This is in accordance with the provisions of Article 115 of the Organic Code of Planning and Public Finance, which states: "No public entity or body may enter into commitments, execute contracts, or authorize or acquire obligations without the issue of the corresponding budget certification."
9. Article 12 of the Organic Law of the Office of the Attorney General of the State provides: "Transaction and withdrawal: Public sector agencies and entities with legal capacity may settle or withdraw from litigation in cases in which they are involved as plaintiffs or defendants, for which they must first obtain the authorization of the Attorney General of the State, when the amount in dispute is undetermined or exceeds twenty thousand United States dollars. Official entities of the autonomous sectional regime shall not require such authorization, but shall be subject to the formalities established in the corresponding legislation. In public sector agencies and entities that do not have legal capacity, the Attorney General of the State is authorized to settle or withdraw from litigation in cases in which it participates as plaintiff or defendant on behalf of such agencies and entities, provided that such actions are in defense of the national heritage and the public interest."