The Arbitration Review of the Americas

2022

Mexico

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The Arbitration Review of the Americas 2022 covers Argentina, Bolivia, Canada, Ecuador, Mexico, Panama, Peru and the United States; and has eleven overviews, including two on arbitrability (one focused on Brazil in the context of allegations of corruption, the other on the relationship with competence-competence across the region). There's also a lucid guide to the interpretation of "concurrent delay" around the region, using five scenarios.

Other nuggets include:

• helpful statistics from Brazil's CAM-CCBC, showing just how often public entities form one side of an arbitration;
• an exegesis on the questions that US courts must still grapple with when it comes to enforcing intra-EU investor-state awards;
• a similarly helpful summary of recent Canadian court decisions;
• another on Mexican court decisions that showed a rather mixed year; and
• the discovery that the AmCham in Peru as of July 2021 now engages in ICC-style scrutiny of awards.

Mexico

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Summary

IN SUMMARY

This article explains Mexico's current approach to arbitration.

DISCUSSION POINTS

- Anti-arbitration injunctions
- Requirements for the recognition and enforcement of an award
- Indirect *amparo* against a court decision rendered in a setting-aside and in a recognition and enforcement procedure
- Petition to refer parties to arbitration

REFERENCED IN THIS ARTICLE

- Mexico's Arbitration Law
- UNICITRAL Model Law of International Commercial Arbitration
- Direct Amparo 159/2019-Third Collegiate Court on Civil Matters of the First Circuit
- Direct Amparo 95/2018-Fourteenth Collegiate Court on Civil Matters of the First Circuit
- First Chamber of the Supreme Court
- Amparo Law
- Mexican Constitution

Mexico has had a long-standing policy in favour of arbitration. Since Mexico adopted the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) in 1993, Mexican courts have reasonably applied the guiding principles behind the Model Law.

There are several decisions from Mexican courts confirming the judiciary's position in favour of party-autonomy[1] by limiting state court intervention and affording outright deference to an arbitrator's award. As is addressed in this article, even Mexican courts, when deciding to refer parties to arbitration, have resolved in favour of arbitration by extending the period set forth in article 8 of the Model Law.

However, there are also cases that can be interpreted as painful decisions from courts misreading or misapplying the Arbitration Law.[2]

We still believe that the reason behind the misapplication of the Arbitration Law's core principles by the state courts in the cases described herein should be understood as a consequence of the lack of exposure of state and federal courts to arbitration-related cases,-[3] including courts in Mexico City,[4] which are, by far, the most experienced in the country, when it comes to arbitration.[5]

As odd as this may seem, it is still not a bad sign, but rather, as recently suggested by the Supreme Court of Justice:

> the lack of cases that reach the judiciary is a clear indication that parties are more likely to honour their commitment to arbitrate than not and will generally comply voluntarily with the resulting award.

Admittedly, this is an important fact that underscores the business community's approach to arbitration and confirms Mexico's position as a premier arbitration hub in the Americas.

There have been some cases that have come dangerously close to severely hampering Mexico's position and its future in arbitration.

In contrast, there are other cases reinforcing Mexican standing policy in favour of arbitration, such as the ruling deciding an arbitration agreement involves only the parties that agreed to.

ANALYSIS OF THE REQUIREMENT FOR DULY AUTHENTICATED ORIGINAL AWARDS IN THE RECOGNITION AND ENFORCEMENT OF AWARDS

As of late 2020, Mexican courts have been burdened by additional formalities and requirements for the recognition and enforcement of awards owing to a decision from a federal circuit court in Mexico City. The decision held that, according to article 1461 of the Arbitration Law – which incorporates article IV of the New York Convention and article 35 of the 1985 UNCITRAL Model Law – for a party to obtain the recognition and enforcement of an award, the party must supply the duly authenticated original award or a certified copy thereof.

The circuit court interpreted that the reference in the Arbitration Law to an authenticated original of the award implied an additional formality, in accordance with Mexican law, that calls for the certification by a notary public that the signatures contained in the award correspond to those of the arbitrators.

The circuit court stressed that to comply with requirements established in article 1461 of the Arbitration Law, the parties were bound to file an original award duly authenticated by a notary public or a duly certified copy by the arbitral institution.

This unfortunate decision departed from the spirit of the New York Convention and the Arbitration Law to the extent it contemplated an additional requirement for the recognition and enforcement of arbitral awards not otherwise foreseen by those bodies of law. According to this decision, parties seeking to enforce or vacate an arbitral award would have to satisfy an additional burden that presented many difficulties, especially in cases where the arbitrators resided in different jurisdictions, since they would have to be present in front of a notary public to certify that the signature on the award corresponds to that arbitrator.

Nevertheless, originating from a motion to review, the First Chamber of Mexico's Supreme Court of Justice reversed the decision and held that, for the purposes of recognition and enforcement of an arbitral award, it is sufficient to submit the original of the award or a certified copy thereof by the arbitral institution, without the need for the authentication of the arbitrators' signatures by a notary public

The case originates from an arbitration seated in London, regarding a dispute between two parties from a financial lease contract and two technical administration agreements entered by the parties of the arbitration proceedings, whereby the claimant granted the use and enjoyment of two ships.

The arbitration proceedings were carried out under the rules of the London Maritime Arbitrators Association; however, the proceedings were discontinued after the parties reached an agreement that was recorded in an award by consent.

Despite the settlement, the losing party failed to comply with its obligations thereunder. As a result of this breach, the claimant initiated enforcement proceedings in Mexico, where a certified copy of the award made by a notary public was provided by the party seeking enforcement.

In accordance with the presumption that an award is valid and enforceable, the Federal District Court in charge of the proceedings held that as long as there was no evidence or an argument on the part of the respondent to prove the lack of authenticity of the award, the requirement to provide the original award was met if a party provided the original award or a certified copy thereof, to the extent there was no evidence that the contents of the award or the arbitrators' signatures were forged.

Accordingly, the Court held that, under such scenario, imposing a requirement upon the party seeking enforcement to provide the authenticated signatures of the arbitrators before public notary would be unconstitutional under article 17 of the Constitution, because it would go against the constitutional mandate to privilege a decision on the merits of the case over a mere formality.

The Court argued that if a party objects to the enforcement of an award on the basis of its lack of authentication (by a notary public) but fails to contest the authenticity of its content or the arbitrators' signatures, a judge must presume that the objecting enforcement is acting in bad faith.

Finally, the Court stated that the only reasons under which a court can refuse to enforce an award are those contained in article 1462 of the Arbitration Law (which incorporates the relevant articles from the UNCITRAL Model Law and the 1958 New York Convention).

Thereafter, the respondent filed a constitutional challenge against the Federal District Court's decision. The challenge was assigned to a federal circuit court, which reversed the lower court's decision and held that the claimant had failed to provide the original of the award or a duly authenticated copy thereof in accordance with article 1461 of the Arbitration Law.

The circuit court ruled that an award cannot be considered as authenticated by a notary public unless the notary public certified that the signatures correspond to the arbitrators that signed the award or, alternatively, arbitrators sign the award before the notary public.

An exceptional motion to review before the Supreme Court of Justice was filed thereafter by the claimant. The First Chamber took on the case in order to determine whether article 1461 of the Arbitration Law was unconstitutional.

In dicta, the First Chamber reasoned that those in charge of administrating justice must resolve the disputes submitted before them without imposing unnecessary obstacles or delays, as well as refraining from denying justice on the basis of formalities or unreasonable interpretations of the law that might prevent or hinder a decision on the merits of the case.

Likewise, the Supreme Court highlighted the link between an arbitration agreement and article 17 of the Constitution, which embodies the former to the extent that the freedom to contract is a constitutionally protected right; thus, parties are constitutionally allowed to

choose to resort to alternative dispute resolution mechanisms or to the jurisdiction of the state.

In addition, the Supreme Court stated that the spirit of article 1461 of the Arbitration Law is certainly not to be interpreted as having arbitrators sign their awards in the presence of a notary public at the time the award is signed, partly owing to the principle of good faith that governs the arbitration procedure, but also because the law does not impose such a requirement.

It emphasised that arbitration awards are to be presumed valid and enforceable, which must be recognised by state courts – confirming Mexico's commitment under international treaties, especially the New York and Panama conventions.

The Supreme Court concluded that the authentication requirement, which had hindered Mexican procedures in the past was unnecessary when the authenticity of the award is not challenged, much less over excessive formalities. Accordingly, it held that the requirement provided for in the second paragraph of article 1461 of the Arbitration Law is unconstitutional as it is contrary to article 17 of the Constitution. It is sufficient that a party seeking to enforce an arbitral award provide the court with an original of the award or a certified copy thereof (ie, removing the language in respect of authentication; therefore, the Supreme Court confirmed the sentence and denied the ***amparo*** protection of the respondent.

By means of the above judgment, the salient characteristics of arbitration as an effective, efficient and secure means to resolve disputes in Mexico have been maintained, and Mexico's pro-arbitration stance before the international community has been reaffirmed by eliminating a formality that otherwise posed an additional burden for parties seeking the recognition and enforcement of an award in Mexico.

INDIRECT AMPARO PROCEEDS AGAINST A LOWER COURT'S DECISION IN SETTING-ASIDE OR RECOGNITION AND ENFORCEMENT PROCEEDINGS

The First Chamber of the Supreme Court resolved a contradiction between two precedents from different circuit courts. The first considered that setting-aside and recognition and enforcement procedures were autonomous and independent from arbitration. To the extent that those proceedings are separate and distinct from arbitration, but only deal with the constitutionality of a final ruling that grants or denies the corresponding motion, a direct ***amparo***[6] is the remedy available against any such decision from the lower court.

Conversely, the precedent from the other circuit court – and the precedent that ultimately prevailed – considered that setting-aside and recognition and enforcement proceedings shall not be deemed as autonomous proceedings because they do not derive from a civil action; rather those proceedings decide whether the award rendered in the arbitration can be vacated or enforced. Accordingly, to the extent that those proceedings deal with procedural matters rather than with the merits of a case, the indirect ***amparo***[7] is the appropriate remedy against the decision rendered by the lower court in setting-aside or enforcement proceedings. The main distinction between a direct and indirect ***amparo***, is that the latter is subject to review whereas the former is final.

This court decision implies that after a decision on setting-aside or enforcement proceedings, two more instances are pending. From the perspective of the ***amparo***, the reasoning of the ruling, is accurate; however, that view is not shared from an arbitration perspective.

Having two instances – the indirect ***amparo*** and the motion to review – separates from the will of the parties to limit the intervention of state courts and also has an impact on arbitration efficiency as the time frame for obtaining a final judgment regarding the validity and enforcement of the award is extended.

This incompatibility between the ***amparo*** and arbitration shows that when adopting a model law, it is essential to carry out a complete and systemic study of the law and the consequences of its adoption, which includes modification or adaptation of legal figures that may be alien or incompatible with the law that is being adopted. Accordingly, when adopting a model law, legislators must modify it so that it is not incompatible with other legal figures of the relevant jurisdiction and for it to adapt to the legal, economic and social reality of the country adopting the law. .

RULING STATING THAT THE PETITION TO REFER PARTIES TO ARBITRATION CAN BE FILED AT ANY MOMENT

In this case, a Mexican company brought a commercial action against five respondents under contracts for the acquisition of bales of cotton. The first respondent did not answer the claim while the remaining four respondents filed as defence the existence of an arbitral agreement. In the first instance, the judge ruled in favour of the claimant.

After several procedures, the respondents challenged the judgment enforcement procedure by seeking an appeal by a superior court in Mexico City. In its decision, the local superior court revoked the first instance ruling in the enforcement procedure by establishing that since the contracts were subject to arbitration, the superior court lacked jurisdiction to study the matter pursuant to article 1424 of the Arbitration Law.[8]

The Superior Court in Mexico City considered that the fact that the first respondent did not answer the claim and, therefore, did not allege the existence of an arbitration agreement does not entail the extinction of its right to request the remit of the issue to arbitration since article 1424 of the Arbitration Law does not fix a time frame for such petition to be filed and also because an arbitration agreement implies a renouncement to a judicial study of the case.

The claimant filed a direct ***amparo*** before a federal circuit court against this ruling by alleging that pursuant to article 1464 of the Arbitration Law, the petition for the remit of the parties to arbitration shall be made in the first statement on the substance of the dispute.

The federal circuit court denied the ***amparo*** based on the fact that the judge of the first instance failed to study the defence requesting to remit parties to arbitration. The federal circuit court stated that request to remit parties to arbitration can be filed at any moment before a ruling is issued and not necessarily in the first statement on the substance of the dispute.

The circuit court decision is based on an interpretation of article 1424 of the Arbitration Law – which provides that the court shall remit parties to arbitration whenever any party so requests – in light of article 17 of the Constitution that privileges the agreement of the parties to solve their disputes through an alternative dispute resolution method.

ANTI-ARBITRATION INJUNCTION AND ORDER TO PLACE AN ARBITRATOR UNDER ARREST FOR CONTEMPT

In the first case, a European investment fund sought arbitration against a Mexican company under a shareholders' agreement, that called for International Chamber of Commerce (ICC)

arbitration in Mexico City. In an attempt to resist arbitration, the Mexican company filed a lawsuit before a municipal court in a northern Mexican state seeking:

- a decision from the court that the arbitration agreement was null and void; and
- an order instructing the arbitral tribunal to suspend the ICC arbitration, pending a decision from the municipal court on the validity or existence of the arbitration agreement.

Even though, the municipal court had no jurisdiction to act in aid of arbitration[9] or to entertain such a lawsuit,[10] the municipal judge admitted the claims and issued an ex parte order instructing the tribunal to suspend the arbitration. The municipal court considered that irreparable harm would be caused to the respondent if the arbitration continued while the court ruled on the validity or existence of the arbitration agreement.[11]

After inviting the parties' comments on the order, the tribunal decided to move forward with the arbitration. The tribunal decided not to suspend the arbitration on the basis of article 1424 of the Code of Commerce, which provides that arbitration proceedings may be commenced or continued, and an award may be made, even when a matter involving an arbitration agreement is pending before the court.[12] In addition, the tribunal took into account the fact that the state court had no jurisdiction or legal basis to suspend the arbitration.

Thereafter, the municipal court issued a second order in which it threatened to sanction the tribunal, should it continue to conduct the arbitration despite its order suspending the proceedings. The court also warned that it would consider the tribunal in contempt and would take measures to place the arbitrator under arrest to face the corresponding criminal charges for disobeying a judicial order.

The tribunal challenged the court's unlawful threats by seeking constitutional relief before a federal district court in Mexico City. The case was finally ruled on appeal by a federal circuit court in Mexico City, the place of arbitration.

In its decision, the federal circuit court unanimously confirmed that the municipal court's order to suspend the proceedings was contrary to the black letter of article 1424 of the Code of Commerce, which clearly prevents a judge from suspending an arbitration.[13] Moreover, the court held that, as a consequence, the continuation of parallel proceedings did not cause any irreparable harm to the parties and thus that the provisional measure adopted by the municipal judge to suspend the arbitration was illegal.[14] The federal circuit court also held that the court's threats to hold the arbitrator in contempt and to place him under arrest were also illegal.

More importantly, the circuit court held that the arbitrator had a legitimate interest in defending his constitutional rights against unlawful action from a court threatening his property and liberty, especially if the court's jurisdiction and authority under the Arbitration Law to act in aid of arbitration were at issue.

The circuit court's decision sends a message that arbitrators do not lose their impartiality by seeking constitutional relief from illegal court intervention with an arbitration, to the extent that such action may cause irreparable harm to the arbitrators' liberty or property rights.

A COURT DECIDING AN ARBITRATION AGREEMENT INVOLVES ONLY THE PARTIES THAT AGREED TO IT

This case derives from a ruling that denied the recognition and enforcement of an arbitral award because it was against public policy. An ***amparo*** procedure was filed against the decision.

In this case, the party challenging the recognition and enforcement of the award alleged that the award was against public policy since it derived from an arbitration agreement that was declared inoperative. As background to this case, in a judicial procedure against several defendants, a party requested the judge's declaration that the contracts' subject matter in respect of the arbitral procedure were connected. Likewise, a party requested the judge to refer them to arbitration. The judge denied the petitions since he considered that the dispute could not be separated and the arbitration agreement did not cover all the parties participating in the procedure.

In the ***amparo***, the court made a study of several arbitration topics. The federal court, following precedents of the Supreme Court of Justice, established that the agreement of the parties to arbitrate a dispute is an expression of a freedom protected by Mexican Constitution.

The ruling states that in a setting-aside procedure or in a recognition and enforcement procedure, the courts that are involved may interpret the terms of the contract and the decisions made by the arbitral tribunal, which do not allow the court to substitute and judges shall limit themselves. The revision standard that shall be carried out by the court is limited to study if the interpretation of the arbitral tribunal is reasonable and is not against public policy.

The court's decision maintains that public policy is neither available for the parties nor for the arbitrator and is located within legal principles protecting the essence of fundamental legal institutions.

The federal court had to establish whether the reasoning of the court denying the recognition and enforcement of the award was legal. The federal court did not agree that public policy was violated as it considered that the denial to refer parties to arbitration did not imply the arbitration clause was inoperative. The federal court established that the will that matters when interpreting a clause is that of the parties and not the will of a third party, which shall not be considered within the arbitration agreement. The federal court decided to recognise and enforce the award.

This case reflects the correct application of the Arbitration Law and the principles contained in the Model Law. It also confirms the judiciary's position in favour of arbitration.

Endnotes

1 An arbitration agreement is, by definition, the maximum expression of party-autonomy.- ^ Back to section

2 Mexico's Arbitration Law is contained in articles 1415 to 1480 of the Code of Commerce, which incorporates the UNICITRAL Model Law of International Commercial Arbitration. Mexico is also a signatory to the 1958 New York Convention, the 1975 Panama Convention and quite recently the ICSID Convention. ^ Back to section

3 Mexican state and federal courts have concurrent jurisdiction in commercial matters, including arbitration. Back to section

4 Mexico City alone has 14 federal circuit courts, 14 federal district courts, 73 local courts and 30 superior court justices that have jurisdiction to act in aid of arbitration. Back to section

5 The courts of Baja California, Jalisco and Nuevo León have also faced several cases and have generally decided in favour of arbitration. Back to section

6 Pursuant to article 170 of the Amparo Law, direct ***amparo*** is meritorious against final judgements, awards or resolutions that end a trial rendered by civil, administrative or labour tribunals. Back to section

7 Pursuant to section IV of article 107 of the Amparo Law, indirect ***amparo*** is meritorious against acts of judicial, administrative or labour tribunals performed out of trial or after its conclusion. Back to section

8 Article 1424 of the Arbitration Law establishes that a court before which an action is brought in a matter that is the subject of an arbitration agreement shall remit parties to arbitration whenever any party requests so, unless it finds that the agreement is null and void, inoperative or incapable of being performed. In this sense, article 1424 is similar to article 8 of the Model Law, but they differ in the established term. The time frame for requesting the remit of the parties to arbitration is foreseen in article 1464 of the Arbitration Law that disposes that the request shall be made in the first statement on the substance of the dispute. Back to section

9 Mexico City was the place of arbitration. Back to section

10 Because of negative effect competence-competence. Back to section

11 The judge did so by applying invalid case law from the Supreme Court that gave jurisdiction to courts – ousting competence-competence – when the existence or validity of arbitration agreement was questioned together with the validity or existence of the underlined contract. To the extent the Supreme Court's case law was against the principle of competence-competence and the separability doctrine, Mexican Congress introduced amendments to the Arbitration Law in 2011 that made it clear the arbitrators, and not the courts, are the first judges of their jurisdiction. Because of the amendments, the Supreme Court's case law was surpassed and is since then inapplicable. Back to section

12 Article 1424 of the Commerce Code. Back to section

13 Except in cases where it is evident that an arbitration agreement is either inexistent or is manifestly null and void. Back to section

14 This position had also been held by the local appellate court on the defendant's motion (the claimant in the arbitration). ^ Back to section

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