The Arbitration Review of the Americas

2021

Mexico

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Across 18 chapters, and spanning 120 pages, this edition provides an invaluable retrospective from 39 leading figures.Together, our contributors capture and interpret the most substantial recent international arbitration events of the year just gone, supported by footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular country as a seat.This edition covers Argentina, Bolivia, Canada, Ecuador, Mexico, Panama, Peru and the United States; has overviews on nascent Brazilian jurisprudence on arbitration and corruption (in the wake of Operation Carwash) and on the coronavirus and investment arbitration, among other things; and an update on how Mexico's federal courts are addressing the problem of personal injunctions against arbitrators that have brought Mexico grinding to a halt as a seat.

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Summary

IN SUMMARY

This text 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 or the First Circuit.
- Direct Amparo 95/2018-Fourteenth Collegiate Court on Civil Matters or the First Circuit.
- First Chamber of the Supreme Court.
- Amparo Law.
- Mexican Constitution.

As noted previously in ***The Arbitration Review of the Americas***, 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 Mexican Arbitration Law.[2]

We still believe that the reason behind the misapplication of the Mexican Arbitration Law's core principles by the state courts in the cases herein described 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 a Supreme Court 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 American continent.

Cases related to (i) anti-arbitration injunctions – court orders enjoining parties from commencing or continuing arbitration proceedings, or those directing parties or arbitrators to suspend the proceedings – (ii) the interpretation of the legal requirements for the recognition and enforcement of an award – establishing more formalities – and (iii) the determination that indirect ***amparo*** proceeds against the court decision rendered in a setting aside and in a recognition and enforcement procedure, may constitute a threat to the foundations of arbitration: party autonomy, competence-competence and minimum intervention from the courts. These cases came 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, like the ruling deciding an arbitration agreement involves only the parties that agreed to.

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 Mexican Arbitration Law.[6]

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 Mexican Arbitration Law does not fix a time frame for such petition 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 Mexican 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 Mexican Arbitration Law – which provides that the court shall remit parties to arbitration whenever any party requests so – in light of article 17 of the Mexican Constitution that privileges the agreement of the parties to solve their disputes through an alternative dispute resolution method.

MANDATORY CRITERION DETERMINING THAT INDIRECT AMPARO PROCEEDS AGAINST THE COURT DECISION RENDERED IN A SETTING--ASIDE AND IN A RECOGNITION AND ENFORCEMENT PROCEDURE

The First Chamber of the Supreme Court solved a contradiction between two criterion. The first one considered that the setting-aside and the recognition and enforcement procedures were autonomous and independent from the arbitration. These procedures are principal and they do not deal with incidental matters. Consequently, the direct ***amparo***[7] proceeds against the decision rendered in these procedures.

On the contrary, the other criterion and the prevailing one, considered the setting-aside and the recognition and enforcement procedures shall not be deemed as principal procedures because they do not derive from a civil action but these procedures decide whether the award rendered in the arbitration can be vacated or can be recognised and enforced, so these procedures deal with procedural matters rather than with the merits of a case. Therefore, the indirect[8] ***amparo*** proceeds against the decision rendered in these procedures. The ruling of the indirect ***amparo*** can be subject of a motion to review.

This court decision implies that after a setting-aside procedure or recognition and enforcement procedure, two more instances are pending. From an ***amparo*** point of view, the reason of the ruling is accurate. However, that view is not shared from an arbitration standing point. Having [In] two instances, indirect ***amparo*** and the motion to review moves apart [is separate] from the will of the parties that does not desire national court intervention and extends the period for obtaining a final judgment regarding the ruling issued on the setting aside and the recognition and enforcement procedures. This incompatibility between the ***amparo*** and arbitration shows that when adopting a model law, it is mandatory to carry out a complete and systemic study of the law and the consequences of its adoption. A model law shall be modified for it to adapt to the legal, economic and social reality of the country adopting the law.

ADDITIONAL REQUIREMENTS FOR THE RECOGNITION AND ENFORCEMENT OF THE AWARD

In another case, a Mexican company initiated a recognition and enforcement procedure of the award before a local court against two respondents. The respondents did not answer the claim. The local court ruled that the claimant did not prove his action and the respondents were absolved.

The local court decided that the claimant did not comply with requirements set forth in article 1461 of the Mexican Arbitration Law because the claimant presented the award, which, for the local court, is a private document. The local court reasoned that for an award to be considered as a public document able to be subject of enforcement, according to article 1461 of the Mexican Arbitration Law, a certification is required. For the court, such certification is foreseen in article 1448, which disposes [proposes] that after the award is rendered, the arbitral tribunal shall deliver each party a signed copy of the award, and it concluded that since it did not happen in this case, the respondents were absolved.

The claimant challenged the local court's decision through a direct ***amparo*** before a federal circuit court. The claimant argued that he filed the original award. Hence, the claimant fulfilled the requirements established in article 1461 of the Mexican Arbitration Law. Likewise, the claimant sustained that the award was delivered to the claimant and both respondents, and that the law does not require for the enforcement of an award its notification to the parties.

In its study, the federal circuit court concluded that according to article 1461, it is not necessary for the party enforcing an award to prove that such award was notified to the parties of the arbitration. The court also reasoned that, in any case, the party resisting the enforcement shall prove that the award was not notified. However, the federal court indicated that the aforementioned article – which is similar to article IV of the New York Convention – established that to obtain the recognition and enforcement of an award, the party applying for recognition and enforcement shall supply the duly authenticated original award. The court interpreted that supplying the original of the award is not enough since the requirement entails an additional formality consisting in that a notary public shall certify that the signatures contained in the award correspond to the arbitrator.

The federal court stressed that to comply with requirements established in article 1461, the parties shall file an original award duly authenticated by a public notary or supply a duly certified copy by authorised personnel of the seat of arbitration – which in view of the federal court can be done by the arbitral institutions.

The federal court granted the ***amparo*** to the claimant for the effect that the local court issue a new judgment stating that the respondents are not absolved and respecting the claimant's right to exercise its claim in a further procedure.

This is an unfortunate decision that departs from the spirit of the Model Law, the New York Convention and the Mexican Arbitration Law, since it sets forth an additional formality and requirement for the recognition and enforcement of award. After this ruling, parties have an additional burden to carry out when applying for enforcement and recognition. In many cases, this burden will represent many difficulties if the arbitrators live in different places and shall [but need to] be in front of the public notary that will certify that the signatures on the award correspond to that arbitrator.

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 continued 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 Mexican 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 such 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 of this case, in a judicial procedure against several defendants, a party requested the declaration of the judge that the contracts subject matter of the procedure were leagued. [please clarify] 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 the 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 study if the reasoning of the court denying the recognition and enforcement of the award was legal. The federal court did not agree that the public policy was violated as it considered that the denial to refer parties to arbitration did not implied 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 Mexican Arbitration Law and the principles of contained in the Model Law. It also confirms the judiciary's position in favour of arbitration.

Endnotes

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