The Arbitration Review of the Americas

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GAR Global Arbitration Review

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Summary

Mexico has had a long-standing policy in favour of arbitration. Like most jurisdictions, Mexican courts have understood the guiding principles behind the UNCITRAL Model Law on International Commercial Arbitration (Model Law) and have applied them with reasonable consistency since its adoption by the Mexican Congress in 1993. As noted previously in The Arbitration Review of the Americas, recent decisions from Mexican courts have confirmed the judiciary's position in favour of party-autonomy, [1] by limiting state court intervention and affording outright deference to an arbitrator's award. One important issue, however, which had not been addressed in court precedents or jurisprudence but that has recently reached the federal circuit courts, [2] is the extent to which anti-arbitration injunctions – court orders enjoining parties from commencing or continuing arbitration proceedings, or those directing parties or arbitrators to suspend the proceedings – adopted as court-ordered interim measures in aid of arbitration are legal under the Mexican Arbitration Framework [3] and if so, to what extent such orders may affect parties, arbitrators and certainly, an arbitral award.

Many will agree that court orders of such nature will generally [4] constitute a threat to the very foundations of arbitration: party-autonomy, competence-competence, the separability of the arbitration agreement and minimum intervention from the courts; let alone a breach of a party's access to justice rights, and quite arguably a breach to Mexico's undertaking in article II of the New York Convention. However, three recent but unrelated cases, before different state courts, produced painful decisions where the courts either misread or misapplied the Mexican Arbitration Law.

The reason behind the misapplication of the Mexican Arbitration Law's core principles by the state courts in these three cases was not deliberate, at least one would hope, but rather a consequence of the lack of exposure of state and federal courts to arbitration-related cases, [5] including courts in Mexico City, [6] which are, by far, the most experienced in the country, when it comes to arbitration. [7]

As odd as this may seem, this is not be taken as 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 honor 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.

The recent cases, though, came dangerously close to severely hampering this position and even the future of arbitration in Mexico in its entirety. In the three cases, the courts either ex parte enjoined parties from initiating arbitration proceedings under a valid arbitration agreement or instructed arbitrators to suspend the proceedings pending one court's decision with respect to the existence of the arbitration clause. In adopting the measures requested 'in aid' of arbitration, the courts' ignored the specialised nature of arbitration-related provisions [8] and either approached the requests as they would normally do under traditional commercial proceedings or mixed arbitration provisions with commercial procedural rules.

Remarkably, the decisions of the federal circuit courts in all three cases ably dissected the extent to which courts are allowed to intervene in aid of arbitration and ultimately revoked all three orders. In their decisions, the federal circuit courts drew upon recent decisions of the Supreme Court that:

- characterise a party's choice to submit its disputes to arbitration as 'the affirmative exercise of that party's constitutional right to party-autonomy'; [9]
- consider that the arbitration agreement involves 'by its nature, the maximum expression of party autonomy'; [10] and
- recognise the principle of the minimal and exceptional intervention of courts in arbitration. [11]

One federal circuit court also invoked a decision from another circuit court that determined that the arbitration framework is specialised to the extent that it excludes any other general provisions of the law. [12]

Anti-arbitration Injunction And Order To Place Arbitrator Under Arrest For Contempt . . . Illegal

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 [13] or to entertain such a lawsuit, [14] 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. [15]

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. [16] 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. [17] 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. [18] 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.

Award Enforced Despite Anti-arbitration Injunction

In a different case, a respondent also obtained an anti-arbitration injunction from a federal district court in Mexico City against the arbitrator at the outset of the proceedings. The arbitrator decided to move forward with the arbitration and fixed a procedural timetable for the parties' submissions. The respondent ceased to participate afterwards and did not file any submission on the merits or otherwise. An award was ultimately entered in favour of the claimant who sought its recognition and enforcement before local courts in Mexico City. The respondent moved the local court to refuse enforcement and to vacate the award. The respondent alleged that the award was contrary to public policy because the arbitrator had illegally continued with the arbitration, despite being suspended by a federal court. The respondent further argued that the continuation of the proceedings prevented it from a full opportunity to present its case because the proceedings were legally suspended. The local court found in favour of the respondent and vacated the award. The court reasoned that by failing to suspend the time limits foreseen in the procedural timetable in light of the anti-arbitration injunction, the arbitrator had infringed the respondent's due process rights and that every step taken by the arbitrator in breach of the court's order was null and void, including the resulting arbitral award.

The claimant challenged the local court's decision to vacate the arbitral award before the federal circuit courts in Mexico City. The circuit court found that the award could not be considered null and void, to the extent that the arbitrator had afforded respondent with a fair opportunity to present its case. The circuit court found that the continuation of the proceedings by the arbitrator despite the anti-arbitration injunction did not amount to a breach of the respondent's due process rights, considering that the respondent was duly aware of the procedural timetable and nothing on the record suggested that the respondent was otherwise prevented from presenting its case. Moreover, the court found that the anti-arbitration injunction had no basis under the Mexican Arbitration Law and that the arbitrator was bound fulfil his obligations regarding the parties to resolve the dispute between them. The respondent was also bound to comply with its obligations under the arbitration agreement and its decision not to participate in the proceedings despite being duly notified of the procedural timetable was to its own detriment. [19]

As in the previous case, the circuit court considered that continuing the proceedings was expressly allowed under article 1424 of the Code of Commerce and that, in any event, the fact that the arbitration continued despite the district court's order enjoining the proceedings

was not sufficient to deny enforcement of an award nor for vacating it. The circuit court overturned the local court's decision, recognised the award and ordered its enforcement.

Order Enjoining Party From Initiating An Arbitration Is A Violation Of A Party's Access To Justice Rights

In two other cases, two different local courts enjoined the parties from initiating arbitration-related proceedings under an arbitration agreement not otherwise declared null and void. In one case, the court enjoined a party from initiating recognition and enforcement proceedings (anti-suit injunction). In the second case, a local court enjoined a party from initiating arbitration proceedings under a valid arbitration agreement until the issue of whether such agreement was null and void or incapable of being performed was resolved by the enjoining court.

In both cases, the federal circuit courts held that an order enjoining a party from initiating proceedings under an arbitration agreement, either for commencing an arbitration or for enforcing the resulting award infringed the party's constitutional access to justice rights. Moreover, such an order was manifestly against the principle of party autonomy, which is one of the cornerstone principles of arbitration.

In conclusion, an order that prevents a party from exercising its constitutional right to initiate an arbitration under a valid arbitration agreement is not only illegal and unenforceable, it is unconstitutional. Under the Mexican Arbitration Law, court intervention is strictly limited to act in aid of arbitration, whether already initiated or not. Court intervention in aid of arbitration certainly does not include the possibility of interfering with a party's right to resort to arbitration for resolving its disputes. Moreover, anti-arbitration injunctions may arguably be considered as a breach of article II of the New York Convention, which expressly compels the contracting parties' state courts to recognise and enforce arbitration agreements.

Constitutional Rights And Arbitration

In 2011, the Mexican Constitution underwent a major overhaul, which is often referred to as the establishment of a 'new constitutional paradigm'. This new constitutional order is premised on the advancement and protection of the human rights recognised by the Constitution, as well as those contemplated in the international treaties signed by Mexico. It has been argued that the 'sole purpose of the state's existence is precisely to guarantee and to protect human rights'. Since 2011, protection of human rights in Mexico is now the guiding principle behind our Magna Charta.

To this end, article 1 of the Mexican Constitution was amended to impose and obligation upon state entities to advance, protect and guarantee human rights. While a general declaration that an act of state or certain legislation is unconstitutional or not is still reserved to the Federal Judiciary, the constitutional amendments specifically authorise state courts to conduct an ex officio analysis of the law, which, in exceptional circumstances, may result in the state court's decision not to apply the relevant legal provision if it deems that such provision is incompatible with the human rights protected under the Constitution and the international treaties to which Mexico is a party.

The constitutional amendments mark an important shift in the control of constitutionality in Mexico, from a centralised (or semi-centralised) system – where the control of unconstitutional acts is exclusive to one organ [20] – to a system of diffuse control of constitutionality, where state court judges are authorised to ignore the application of a

legal provision should it deem it contrary to the human rights protected under international treaties, particularly under the American Convention on Human Rights. [21] Under this new constitutional paradigm, the Supreme Court has held that if the rights and remedies afforded to parties with respect to human rights are more favourable under international treaties than those afforded by Mexican legislation, then the state court must favour the application of the rule that is more beneficial to that party.

The question that has come up recently is whether and to what extent are arbitrators bound to observe this new paradigm when resolving a commercial dispute and decide, for example, not to apply the contractual interest rate agreed upon by the parties under the argument that such interest rate may amount to usury and thus a breach of a party's human rights (exploitation of men by men). The second and most complicated question is whether an arbitrator that decides to apply or not, on whatever basis, a legal or contractual provision that may otherwise be considered as contrary to the pro homine principle and the Constitution's mandate to favour the application of human rights, may open the door to judicial review of the merits of the award, either for failing to apply the Constitution's mandate or by applying a legal or contractual provision that may be considered in violation of human rights.

The answer to these questions is not as simple as it may seem. Arbitrators are chosen to resolve a commercial dispute, not to protect human rights. However, because arbitrators are bound to apply the rules of law chosen by the parties to resolve the merits of the dispute, to what extent are arbitrators bound to apply the new constitutional paradigm as part and parcel of Mexican law? What happens if an arbitrator decides not apply a legal or contractual provision because such provision may be contrary to a party's human rights? What happens if the arbitrator simply ignores the new paradigm and decides to apply the legal and contractual provision because of pacta sunt servanda? Does the application by an arbitrator of human rights principles open the door to an additional ground for annulment or denial of enforcement, forcing the judiciary to carry out a de novo review of the merits of the case?

First, it is undisputed that judicial precedents only bind lower courts and arbitrators are not under any obligation to apply it. [22] Second, article 1 of the Constitution only imposes state courts and state agencies to exercise a diffuse control of the Constitution, it does not bind private parties from doing so, as the protection of fundamental rights is reserved to the state. An arbitrator, however, is free to entertain the question of whether a legal or constitutional provision may be contrary to the array of human rights protected by the Constitution and international treaties. The fact that by carrying out a diffuse control of the constitutionality of a legal or contractual provision is a question that relates to the merit of the case, means thus that the arbitrator's decision in any direction cannot analysed by the judiciary, much less constitute grounds for annulment of the award, in the same manner as the misapplication of a rule of law by the arbitrator on the merits is also not a basis for annulment.

In a recent case, an arbitrator decided that if the parties wanted their human rights to be protected they would have included a forum selection clause instead of an arbitration clause, for it is the judiciary the one that is bound to protect the parties fundamental rights by exercising a diffuse control of constitutionality. However, the arbitrator reasoned that since the parties had agreed that Mexican law was to apply to the merits of the case, the arbitrator found that nothing prevented it from performing an interpretation in accordance with the new constitutional paradigm. The question before the arbitrator was whether an option put under a shareholders' agreement calling for the purchase of the shares by the respondent

in an amount equal to the amount invested plus a 25 per cent premium that was triggered by the respondent's bad faith was against human rights to the extent that the premium was considered to amount to usury. The arbitrator found that the 25 per cent annual premium on the amount invested was not against human rights as such provision could not amount to usury, specially in the context of the business relationship between the parties and the fact that such provisions where more common than not in joint ventures of this nature.

While the case has not reached the federal courts, three Supreme Court justices (one current and two recently retired) have confirmed that such approach is equally valid as one that does not entertain the question (to the extent that the protection of human rights is reserved to the state). In any event, all three justices were unanimous in holding that whether or not an arbitrator deals with the issue of human rights or not, whether the arbitrator's decision is correct or not is not a question for the judiciary to resolve, since its analysis should be limited to the grounds established in the New York Convention and the Mexican Arbitration Law (UNCITRAL Model Law).

Notes

[1] An arbitration agreement is, by definition, the maximum expression of party-autonomy.

[2] In Mexico, state and federal courts have concurrent jurisdiction over commercial matters. However, the federal circuit courts are the courts of last resort in commercial matters, hence, any motion to state or federal court seeking aid in an arbitration or any decision with respect to the recognition and enforcement or the annulment of an award will be ultimately decided by the federal circuit courts, either under a appeal for review, in which the circuit court performs a de novo review of a decision in a constitutional challenge of an act of the state, or under a constitutional challenge of a final judgment.

[3] 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.

[4] A judge may deny a request to refer parties to arbitration if no arbitration agreement exists or if it is manifestly void or incapable of being performed.

[5] Mexican state and federal courts have concurrent jurisdiction in commercial matters, including arbitration.

[6] 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.

[7] The courts of Baja California, Jalisco and Nuevo León have also faced several cases and have generally decided in favour of arbitration.

[8] Thesis of a specialised nature of arbitration.

[9] Arbitration. Regulatory Implications of its Constitutional Nature as of June 2008. Epoque: Tenth Epoque, Registry: 2014010, Instance: First Hall, Type of Thesis: Isolated, Source: Federal Judiciary Gazette, Book 40, March 2017, Tome I, Subject Matter(s): Constitutional, Thesis: 1st. XXXVI/2017 (10th), Page: 438).

[10] Arbitration Trial. The provision of the law that contain the arbitration trial are expressly agreed upon, if in a contract the parties agree, in case of conflict, to submit (to arbitration). Epoque: Eighth Epoque, Registry: 206812, Instance: Third Hall, Type of Thesis: Isolated, Source: Federal Judiciary Gazette, Tome X, August 1992, Subject Matter(s): Civil, Thesis: 3rd. LX/92, Page: 153.

[11] Commercial Arbitration. Relevant Principals and Aspects that Govern Title Fourth of Book Five of the Commerce Code. Epoque: Ninth Epoque, Registry: 166510, Instance: First Hall, Type of Thesis: Isolated, Source: Weekly Federal Judiciary Register and its Gazette, Tome XXX, September 2009, Subject Matter(s): Civil, Thesis: 1st. CLXX/2009, Page: 427.

[12] Commercial Arbitration. Its legislation is specialised and therefore exclusive of general norms. Epoque: Ninth Epoque, Registry: 163413, Instance: Collegiate Circuit Courts, Type of Thesis: Isolated, Source: Weekly Federal Judiciary Register and its Gazette, Tome XXXII, December 2010, Subject Matter(s): Civil, Thesis: I.7o.C.150 C, Page: 1734.

[13] Mexico City was the place of arbitration.
[14] Because of negative effect competence-competence.
[15] 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 Mexican 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.
[16] Article 1424 [QUOTE].
[17] Except in cases where it is evident that an arbitration agreement is either inexistent or is manifestly null and void.
[18] This position had also been held by the local appellate court on the defendant's motion (the claimant in the arbitration).
[19] The fact that the defendant failed to comply with the deadlines established in the procedural calendar, is not justified by the suspension decreed by a federal judge in a commercial proceeding when in a previous agreement he undertook to comply with them, as it is true that, although there is a determination outside the arbitration that ordered to suspend it, the defendant remains subject to the arbitration power and as the plaintiff rightly contends, the suspension of the proceeding was a determination addressed to the arbitrator, who could or could not abide by it, but the parties they are still obliged to comply with the arbitration procedure, since their procedural action is regulated by the stages and deadlines defined as agreed in the arbitration agreement.
[20] In Mexico only the Federal Judiciary, through the Federal District Court, the Federal Circuit Courts and the Supreme Court can declare the unconstitutionality of an act of state or legislation.
[21] Otherwise known as the Pact of San José.
[22] Even though tribunals will more often than not apply the Federal Judiciary's jurisprudence.

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