

Enforcement of Foreign Arbitral Awards: The Mexican Experience

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The use of international commercial arbitration between foreign investors and their Mexican business partners has seen a substantial increase, especially since the North American Free Trade Agreement (“NAFTA”) entered into force in 1994, and of which Mexico is a member state¹. Until the late 1960s, Mexico was, legally speaking, a closed country that did not permit the execution of foreign awards and its procedural codes did not contain provisions for the execution of foreign judgments or conflicts of law.² In line with its nationalistic and inward judicial policy, Mexico did not sign early treaties such as the Montevideo Treaty on International Penal Law of 1889,³ and the Bustamante Code on Private International Law of 1928,⁴ which laid the basis for private international law in the Americas, as well as none of the early Hague Conventions. However, from the early 1970s on Mexico gradually opened its legal system and in the 1980s it did a quantum leap towards internationalization of its legal and judicial system, signing several international treaties. Mexico ratified in 1971 the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”),⁵ in 1978, it ratified the Inter-American Convention on International Commercial Arbitration (“Panama Convention”),⁶ and in 1986 it ratified the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (“Montevideo Convention”).⁷ In preparation for NAFTA, Mexico

¹ NAFTA was signed on December 17, 1992 and it came into force on January 1, 1994.

² Jorge A. Vargas, *Enforcement of Judgments and Awards in Mexico*, 5 U.S. –Mex. L.J., 1997, p. 137, 140.

³ Adopted by the First South American Congress on Private International Law in Montevideo, Uruguay on 23 January 1889.

⁴ The Bustamante Code was produced in 1928 at the VIth International Conference of American States in Havana, Cuba.

⁵ Adopted by the diplomatic conference on June 10, 1958, entering into force on June 7, 1959; Mexico ratified the convention on April 14, 1971, entering into force on July 13, 1971.

⁶ The treaty was adopted at Panama, Panama, on January 30, 1975 at the Inter-American Specialized Conference on Private International Law, entering into force on June 16, 1976; Mexico signed the convention on October 27, 1977, ratified it on February 15, 1978 and deposited it on March 27, 1978.

⁷ Mexico signed the convention on December 2, 1986, ratified it on February 11, 1987 and deposited it on June 12, 1987; Mexico made reservations; Mexico also signed and ratified the Treaty with Spain on the Recognition and Enforcement of Judgments and Arbitral Awards in Civil and Commercial Matters, published in the Official Gazette of the Federation on March 5, 1992.

adopted in 1993⁸ with minor changes the UNCITRAL Model Law on International Commercial Arbitration.⁹ By this, Mexico set its legal foundation for arbitration.

What was once considered a new and scarcely used mechanism to resolve disputes, has now become a common standard in business contracts with Mexican counterparts.

Introduction

Arbitration is a private proceeding based on an agreement.¹⁰ The very nature of arbitration is to provide a dispute resolution mechanism aside from the judicial system.¹¹ As a general rule, matters governed by commercial arbitration do not require judicial intervention, unless otherwise provided.¹² However, there are several situations in which the path of arbitration and the judiciary cross. Such are, among others, the enforcement of awards. Ideally, the role of the judicial system is to support arbitration,¹³ in order to provide a speedy and easy proceeding. In general terms, the relationship between arbitration and the Mexican judiciary is good. Judges provide the necessary support when requested and usually limit their actions as provided by law.

Why consider Arbitration?

A major arguments in favor of arbitration when doing business in Mexico is the fact that the enforcement of a foreign arbitral award takes less time and is less complicated than the enforcement of a judgment. While the enforcement of an arbitral award only requires presenting the award and the arbitration agreement to the competent court, the enforcement of a judgment is far more complicated. Before the Mexican judge even considers analyzing the matter, an often long diplomatic and judicial procedure has to be performed to get the judgment on the

⁸ Published in the Official Gazette of the Federation on July 22, 1993.

⁹ Adopted by resolution of the General Assembly of the United Nations on December 11, 1985, as amended in 2006.

¹⁰ Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, Vanderbilt Journal of Transnational Law, Vol. 36, 2003, I. Introduction.

¹¹ Mexican Supreme Court Judgment, Quinta Época, Instancia Tercera Sala, Fuente Apéndice 1917-2000, Tomo IV, Civil, Sección Precedente Relevante S. C. J. N., Materia Civil, Amparo civil en revisión 4660/31.- Compañía Mexicana de Petróleo "El Águila", S. A.-26 de mayo de 1993.- Unanimidad de cinco votos.- Excusa: Ricardo Couto.- La publicación no menciona el nombre del ponente, Semanario Judicial de la Federación, Quinta Época, Tomo XXXVIII, página 801, Tercera Sala.

¹² Article 1421 of the Mexican Commercial Code.

¹³ Francisco González de Cossío, *El Arbitraje y Judicatura: Un Binomio Necesario en la Ecuación de Procuración de Seguridad Jurídica*, p. 7.

Mexican judge's desk.¹⁴ Furthermore, while an award is presumed enforceable unless the contrary is proven (inverted burden of proof), the party interested in enforcing a foreign judgment needs to prove that all conditions for the enforcement are met. Article 571 of the Federal Code of Civil Procedures states eight conditions: (i) All formalities for letters rogatory must have been satisfied; (ii) the judgment must not be the result of an *in rem* suit; (iii) the judgment must have been rendered by the competent court; (iv) the defendant must have been duly served; (v) the judgment must be final and considered *res judicata*; (vi) the same legal action must not have been tried or be pending at a Mexican court; (vii) the judgment must not be contrary to Mexican *ordre public*; and (viii) the judgment must fulfill all the formal conditions to be deemed authentic. To complicate matters more, some Mexican states have issued their own legislation regulating the enforcement of judgments.

But even if the conditions are met, according to paragraph two of Article 571 of the Federal Code of Civil Procedures, there is no guarantee the foreign judgment will be enforced. The Mexican judge has discretion to deny enforcement due to reciprocity, i.e. if foreign judgments of similar nature are not enforced in the country of origin.

In view of the above, the following shall briefly analyze from a practical perspective the Mexican experience of enforcement of foreign commercial arbitral awards and the role of the Mexican judiciary system.

Legal Background

Mexico incorporated the UNCITRAL Model Law into the Mexican Commercial Code in Book V, Title VI (articles 1415 to 1463). These provisions apply to domestic and international arbitration.¹⁵ As a general rule, any private dispute may be settled by arbitration provided the law does not stipulate otherwise. The Commercial Code does not contain specific provisions on limitations of disputes that can be submitted to arbitration. However, Mexican law denies arbitrability when a third party is affected, unless there is express authorization to do so, or when the disputed issue is of public interest. In this respect, article 615 of the Code of Civil Procedures for the Federal District states

¹⁴ Jorge A. Vargas, *Enforcement of Judgments and Awards in Mexico*, 5 U.S.-Mex. L.J., 144-147.

¹⁵ Article 1421 of the Commercial Code states that the provisions "shall apply to national and international commercial arbitration when the site of arbitration is in the national territory, except as provided in international treaties to which Mexico is a party."

that the right to child support, divorces, annulment of marriage, and issues regarding the marital status, may not be subject to arbitration. Other matters are concern tutors for children (Article 612 Code of Civil Procedures for the Federal District) and the testamentary executors (Code of Civil Procedures for the Federal District).¹⁶

In Mexico, the legal basis for the enforcement of foreign arbitral awards is set forth in articles 1457 to 1463 of the Commercial Code, the international treaties and conventions subscribed by Mexico and case law.

By adopting the New York Convention and the UNCITRAL Model Law, certain of their principles are applicable to Mexico. For example, awards must be enforced. However, the exception to that principle is that Mexican judges have discretion and not the obligation to enforce the awards (or not) but only in the cases stated by the Commercial Code. The law states very clear that the causes are considered a *numerus clausus* by the use of the word “only” (“*solo*”) in the respective Article 1462 of the Commercial Code.¹⁷ The aforementioned discretion is again limited by the presumption of validity of the awards and the analysis of the judge is limited to the control of the form. Also, the principle of equal treatment of foreign and national awards, established in Article II of the New York Convention, is provided in Article 1415 of the Commercial Code. The Third Collegiate Tribunal for Civil Matters of the First Circuit clearly limits the inherence of the judge to the above mentioned control of form, and goes even further by stating that the judge is not the competent authority to decide over acts that occurred during the arbitration procedure. The only authority to decide in these cases is the arbitrator himself.¹⁸

Requirements

Not much is required to enforce a foreign arbitral award. According to Article 1462 of the Commercial Code, the interested party will only need to present the original or certified copies of the arbitration agreement and the arbitral award when requesting enforcement. The arbitral award needs to be legalized or

¹⁶ Amparo directo 1303/2001. Constructora Aboumrad Amodio Berho, S.A. de C.V. 8 de marzo de 2001. Unanimidad de votos. Ponente: Neófito López Ramos. Secretaria: Lina Sharai González Juárez.

¹⁷ Article 1462 states: “The recognition or enforcement of an arbitral award may *only* be refused, whatever the country in which it might have been issued, if...” (emphasis added)

¹⁸ Amparo directo 350/2006. Servicios Administrativos de Emergencia, S.A. de C.V. 8 de septiembre de 2006. Unanimidad de votos. Ponente: Neófito López Ramos. Secretaria: Lizette Arroyo Delgado.

apostilled. In case any of these documents is drafted in another language than Spanish, it needs to be translated by a sworn translator.

These documents are presented to the competent judge requesting recognition of the award ("*reconocimiento*").¹⁹ This procedure provides legal effect to the resolutions contained in a foreign award. The recognition converts the foreign award and its resolutions into a title enforceable in Mexico ("*exequatur*"). The recognition of an award may be necessary to prove in Mexico that the matter is *res iudicata*. It is not the enforcement in itself but a necessary step towards it.

The next step is the enforcement ("*ejecución*"), which represents the use of public force by the judiciary to ensure that the resolutions of the recognized arbitral award are complied with. The same requirements apply as to the presentation of documents.

The reasons for which a judge may deny enforcement are set forth in Article 1462 of the Commercial Code. It clearly states that the burden of proof is on the party against which the award is being enforced. The burden of proof is thus inverted. This party will need to prove any of following reasons listed below to deny the enforcement. In turn, this means that an award is presumed enforceable by Mexican law.

The causes are that: (i) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration [...]; (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made. Finally, the enforcement can be denied if the

¹⁹ Amparo en revisión 4422/2001. Jamil Textil, S.A. de C.V. 13 de septiembre de 2001. Unanimidad de votos. Ponente: Luz Delfina Abitia Gutiérrez. Secretaria: María del Consuelo Viveros Romero.

Mexican judge finds that (i) the subject-matter of the dispute is not capable of settlement by arbitration under Mexican law; or (ii) the recognition or enforcement of the award would be contrary to the *order public*.

Judicial Procedure

According to Article 1422 of the Commercial Code, the competent judge for the recognition or enforcement is the federal or local judge of first instance of the domicile of the person or entity against whom the award is being enforced or where the assets are located. The Third Collegiate Tribunal of Civil Matters of the First Circuit acknowledged that the arbitral award is a title that renders the subject matter *res iudicata* and motivates enforcement, limiting the action of the judge to the declare the enforcement and the judge's possibility to control the award to the conditions established by law.²⁰ But as the arbitrator lacks the public force to make the condemned party comply with the award, it is the judge who helps , the According to Articles 1460 and 1463 of the Commercial Code, the procedure to be used for both the recognition and the enforcement, is the so called incidental procedure ("*incidente*") established in Article 360 of the Federal Code of Civil Procedures. The term "*incidental proceeding*" describes a concept that is ancillary to the principal suit or action. The word "*incidental*" derives from the Latin *incido incidens* (interrupt, suspend) which means, in a broader sense, depending on or appertaining to something else as primary. Legally speaking, it refers to a question that arises in a primary suit, to which it is related. However, in the case of the enforcement of an award, there is no primary procedure to which the enforcement is "*incidental*", unless the arbitration in itself is considered the main procedure. As the enforcement of an arbitral award does not exactly match the concept of the incidental proceeding, it may be correct to say that the intention of the legislator was that the enforcement be made by means similar to an incidental proceeding, using the same terms and steps set forth in article 360 of the Federal Code of Civil Procedures. This is also a view adopted by courts, such as the First Collegiate Tribunal of the Ninth Circuit that states that the proceeding to be used in enforcement is the incidental proceeding established in Article 360.²¹ The First

²⁰ Amparo directo 1303/2001. Constructora Aboumrad Amodio Berho, S.A. de C.V. 8 de marzo de 2001. Unanimidad de votos. Ponente: Neófito López Ramos. Secretaria: Lina Sharai González Juárez.

²¹ Amparo en revisión 29/99.-Aceros San Luis, S.A de C.V. y otros.-12 de agosto de 1999.-Unanimidad de votos.-Ponente: Enrique Arizpe Narro.-Secretario: Juan Guillermo Alanís Sánchez, Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo X, diciembre de 1999, página 733, Tribunales Colegiados de Circuito, tesis IX.1o.39 C.

Collegiate Tribunal in Civil Matters of the First Circuit rejected an argument by a party in the incidental procedure of enforcement, that it was not granted its constitutional right of hearing. The party wanted to open a separate proceeding to re-litigate the matter. The court held that the parties were given sufficient possibility to bring forward their case in the arbitration itself and that the enforcement proceeding did not serve that purpose due to the limitations imposed on the judge to review the award.²²

The same procedure has to be followed in case the award cannot be enforced (after being declared enforceable) for any reason. In this case, the interested party may request from the court through the incidental proceeding set forth in Article 360 of the Federal Code of Civil Procedures to declare a substitute way of enforcement, i.e. if the original enforcement was focused on a payment for damages, the court may resolve that assets have to be sold to obtain the payment capacity.²³

Also, Mexican courts allow for the recognition and enforcement in one procedure. The First Collegiate Tribunal of the Ninth Circuit held, that the judge may declare the recognition in the final judgment of the enforcement procedure, saving the interested party from initiating a previous separate procedure for recognition of the award.²⁴ It is important to note that, also, courts allow for the annulment and enforcement in one incidental procedure, i.e. one party initiates an annulment procedure and the party interested in the enforcement of the foreign award counterclaims in the same procedure the recognition and enforcement of the award. This way the parties do not have to initiate two separate proceedings and it secures one single cohesive decision.

The court's decision on the enforcement is final and cannot be appealed. However, there was a debate in courts of whether decisions that were taken during

²² Amparo en revisión 1281/87. Padilla Graciano Luis, Amira Kuri de Padilla y Begoña Cortés de Miguel. 25 de enero de 1988. Unanimidad de votos. Ponente: Luz María Perdomo Juvera. Secretario: Rodolfo Ortiz Jiménez; Amparo en revisión 1231/87. Laura Elena González Muñoz. 25 de enero de 1988. Unanimidad de votos. Ponente: Eduardo Lara Díaz. Secretario: Agustín García Silva.

²³ Third Collegiate Tribunal in Civil Matters of the First Circuit. Amparo en revisión 117/2008. Enrique Autrique Gómez y otra. 19 de mayo de 2008. Unanimidad de votos. Ponente: Neófito López Ramos. Secretario: José Luis Evaristo Villegas.

²⁴ Amparo en revisión 29/99.-Aceros San Luis, S.A de C.V. y otros.-12 de agosto de 1999.-Unanimidad de votos.-Ponente: Enrique Arizpe Narro.-Secretario: Juan Guillermo Alanís Sánchez. Semanario Judicial de la Federación y su Gaceta, Novena Época, Tomo X, diciembre de 1999, página 733, Tribunales Colegiados de Circuito, tesis IX.1o.39 C.

the incidental procedure could be challenged. The Mexican Supreme Court ended this debate and held that the decisions, taken during the incidental proceeding could not be challenged.²⁵

Another aspect of this topic is the enforcement of awards that were annulled in the country they were issued. The controversy around this problem is still in process and so far Mexican courts have not yet decided on it. The topic is very ample and a discussion of it would go beyond the scope of this article.²⁶

Amparo

Finally, a review of the Mexican practice regarding the enforcement of foreign arbitral awards would not be complete without touching the subject of the *amparo* suit. The decision on enforcement can be challenged by the *amparo*. The Mexican procedure of *amparo* is an order for protection on a constitutional basis against the acts of authorities, including court judgments. The *amparo* is governed by the Mexican Constitution and the Amparo Law. There are two different types of *amparo* procedures: The direct *amparo* (*amparo directo*) which is provided under section V of Article 107 of the Constitution; and the indirect *amparo* (*amparo indirecto*) which is provided under section VII of Article 107 of the Constitution. The direct *amparo* involves the cessation or annulment of a court judgment, providing an additional forum to challenge a “final” judgment. The indirect *amparo* is a separate and independent proceeding involving review of a court ruling by District Courts and Circuit Courts and in exceptional cases the Supreme Court on a Constitutional basis.

This is relevant to the foreigner who wishes to enforce an award in Mexico. He should be aware that the *amparo* provides the party that does not agree with the decision of the judge in the incidental proceeding of enforcement (either to declare or to reject enforcement), with a separate, constitutional, possibility to challenge that decision. In this respect the Mexican Supreme Court decided that in the event a the decision of enforcement is challenged by way of the *amparo*, the correct proceeding to follow is that of the indirect *amparo* to be brought before federal judges, as established in Article 114, section III, second paragraph of the

²⁵ Contradiction 40/2007-PS between the Fourth and Seventh Collegiate Civil Courts of the First Circuit.

²⁶ For further study: Jan Paulsson, Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA). The ICC International Court of Arbitration Bulletin, Vol. 9, No. 1 – May 1998, p. 14.

Amparo Law, as the challenged act is not, as required for the indirect amparo a definitive decision (arbitral award) but a series of complex acts.²⁷

Final note

Foreign investors trying to enforce an award should be aware of the above as it could stretch their planned time schedule for the enforcement of an award. This is demonstrated by an important case between two Mexican radio stations.²⁸

Claimant initiated an arbitration proceeding against respondent before the International Chamber of Commerce (ICC) pursuant to which it sought rescission of an agreement and the payment for damages. The arbitration was based on the arbitration clause included in the Agreement. The clause provided that the arbitral tribunal (the "Tribunal") had to be comprised of three arbitrators (the "Arbitrators") who were experts in the subject matter. Both parties to the arbitration expressly accepted the members of the Tribunal as Arbitrators and their expertise in the matter in question. The arbitrators held in their final award (the "Award") that the defendant was in breach of the agreement and awarded an indemnity payment.

Defendant challenged the validity of the Award through an incidental plea for annulment ("*incidente de nulidad*"). It argued that the Arbitrators were not recognized as experts and had not proven their expertise in the subject matter. The judge nullified the Award, holding that the tribunal had in fact not proven its expertise in issues relating to the radio industry. Claimant contested the decision in an indirect amparo proceeding. It argued that the judge had not considered the arbitration clause of the Agreement, or the relevant arbitration rules of the ICC and applicable international treaties. The amparo judge awarded protection to Claimant declaring decision of the prior judge null and void and ruling that the incidental plea for annulment of the original Award was without merit. As it was an indirect amparo proceeding, Respondent appealed this decision. The appellate court in ten indirect amparo proceeding held that the proceeding at hand was not

²⁷ Octava Época, Contradicción de tesis 21/93.-Entre las sustentadas por los Tribunales Tercero y Segundo Colegiados, por una parte, y Quinto Tribunal Colegiado, todos en la Materia Civil del Primer Circuito.-18 de octubre de 1993.-Unanimidad de cuatro votos.-Ponente: Miguel Montes García.-Secretario: Jorge L. Rico Rangel; Apéndice 1917-1995, Tomo IV, Primera Parte, página 181, Tercera Sala, tesis 267; véase la ejecutoria en el Semanario Judicial de la Federación, Octava Época, Tomo XII, diciembre de 1993, página 533.

²⁸ Mauricio Foeth, Javier Quijano Baz, David's Loss? Infored v. Radio Centro before the Supreme Court of Mexico, *Verfassung und Recht in Übersee, Law and Politics in Africa, Asia, Latin America*, I 2009, 42nd year, p. 106.

an “indirect” amparo but in fact a “direct” amparo for which the appellate court was the only forum. Then, instead of analyzing the arguments made in the amparo on appeal, the appellate court proceeded to render a judgment on the facts of the case. It denied the amparo, thereby confirming the original decision to nullify the Award.

In response to this decision, Claimant filed a constitutional complaint before the Supreme Court in which it alleged that the appellate court had misinterpreted certain constitutional concepts and thus wrongly decided that the proceeding at hand was a direct amparo without a right to revision by the Supreme Court. The complaint was decided in favor of Claimant and Claimant enforced its arbitral award.