The Mexican Courts and Arbitration: A New Partnership

Marco Tulio Venegas[1]

I. Introduction

It is safe to say that a new era of commercial arbitration in Mexico started when Title IV of the Fifth Book of the Commerce Code was enacted, back in 1993 (CHECAR). Said Title incorporated, with some minor changes, the International Commercial Arbitration Model Law of the United Nations Commission on Trade Law (hereinafter the "Model Law"). However, the reality is that without the cooperation of Mexican courts and the proper interpretation of this law, the legal provisions of Title IV are useless.

Fortunately, Mexican courts have systematically adopted a friendly approach towards arbitration. They have understood that arbitration is not an enemy but rather a true ally. In doing so, they have closely monitored the basic principles of legality in arbitration.

The purpose of this article is to summarize the most relevant decisions issued by Mexican courts with respect to arbitration. The decisions rendered by Mexican courts have been the result of two types of disputes:

i Disputes arising from parallel litigation procedures in which the validity of arbitration clauses is questioned; and

ii Disputes concerning the enforcement of arbitral awards or nullity procedures against arbitral awards.

Due to the special nature of the Mexican Judicial System, these types of disputes are ultimately decided through a constitutional procedure called "amparo." Therefore, all the decisions addressed here are contained in amparo rulings.

Frequently addressed and relevant topics related to arbitration in the judicial decisions of the Mexican courts are:

a. The constitutionality of arbitration;
b. The intervention of the judicial authority in arbitral proceedings;
c. Remittance to arbitration;
d. The interpretation of the competence-competence principle;
e. Procedural matters in connection with the recognition and enforcement of the arbitral award;
f. Essential characteristics of the arbitral award; and
g. Causes of nullity of the arbitral award and procedural matters in connection with the setting aside of arbitral awards.

A. The Constitutionality of Arbitration

The most important decision in connection with the relationship between arbitration and Mexican courts dealt with the constitutionality of the arbitration as a valid legal method to resolve disputes among private parties.[2] This dispute was based on article 13 of the Political Constitution of the United Mexican States, which establishes that no one may be judged by a special court. Some were concerned that arbitration as a private means of dispute resolution constituted a special court, prohibited by the Mexican Constitution.

This question was finally addressed by the First Chamber of the Supreme Court of Justice which ruled that (i) the constitutional principle was limited to prohibiting the establishment of special judicial courts and (ii) that arbitral tribunals could not be considered judicial courts since they do not form part of the Mexican judicial branch. Rather, arbitral tribunals are composed of private persons who are expressly appointed by the parties to resolve a dispute between them; therefore, arbitrators do not have the jurisdiction, power and authority to enforce the awards they issue and must recur, as a complementary action, to a competent judge for the recognition and enforcement of the award issued. The conclusion then was that it is constitutionally permissible for private parties to submit their disputes to an arbitrator for resolution. The arbitral tribunal is not a special court, therefore article 13 of the Political Constitution of the United Mexican States is not violated.

With this decision, arbitration was deemed a valid method of dispute resolution by the Supreme Court of Justice, allowing for its healthy growth and development in the Mexican Judicial System.

B. The Intervention of Judicial Authorities in Arbitration

In 2007, the Third Collegiate Court in Civil Matters of the First Circuit detailed the circumstances before or after the filing of the arbitral proceeding, in which the involvement of the judicial authority in arbitral proceedings is legally permissible.[3] In order

[1] Marco Tulio Venegas is an attorney at Von Wobeser and Sierra. He is a member of the Barra Mexicana, Colegio de Abogados and has a law degree from Escuela Libre de Derecho in Mexico City. He participated as a trainee in the Secretariat of the ICC's International Court of Arbitration in Paris in 2000 and has also worked as a foreign partner in arbitration for Freshfields, Bruckhaus & Deringer.

[2] *See* Amparo in Review No. 237/2004, Emilio Francisco Casares Loret de Mola (April 28, 2004), which ruling is contained in the decision: I.a. CLXXXVI/2004, of the First Chamber of the Supreme Court of Justice of the Nation, Ninth Period.

[3] *See* Direct Amparo 350/2006, Servicios Administrativos de Emergencia, S.A. de C.V. (September 8, 2006), which ruling is contained in the decision: I.3rd.C.566 C, of the Third Collegiate Court in Civil Matters of the First Circuit, Ninth Period.

for the courts to determine the validity of the arbitral agreement, the court must determine that the judicial role is enumerated in the Commerce Code, in title IV of Book V. Permissible points of review are: (i) request for provisional precautionary measures, (ii) appointment, recusal or removal of the arbitrator, (iii) when a motion for the incompetence of the arbitral Tribunal is filed and is rejected, (iv) presentation of evidence, (v) observations with respect to the fees of the members of the tribunal, (vi) setting aside of final awards and (vii) recognition and enforcement of awards.

Although this precedent basically repeated what the Commerce Code established, it is useful since it implies ratification by Mexican courts of the limited cases in which judicial intervention is allowed.

C. Remittance to Arbitration

Article 1424 of the Mexican Commerce Code establishes that a dispute subject to an arbitration agreement submitted to a Mexican court must be remitted to arbitration as soon as one of the parties so requests. The exception to this occurs when it is established that such agreement is null and void, invalid or impossible to enforce. This is what is known in Mexico as the "*remittance to arbitration.*" It is important to note, however, that this provision, unlike the UNCITRAL Model Law, does not set a time limit in which a party must ask the Court for remittance to arbitration.

In light of this rule, in 2005 there was a procedural dispute over the correct time for the remittance to arbitration. In this dispute, the Third Collegiate Court in Civil Matters of the First Circuit determined that the proper procedural moment for the judge to decide whether to remit the parties to a dispute to arbitration is when the judicial court hearing the matter receives the request for such remittance from the parties, and it has all the elements for making a decision for that purpose. [4] Therefore, a party can request the remittance to the arbitral proceeding at any time from answering the claim until before the decision on the merits is made, because with that, the jurisdiction of the judge is exhausted. In the same decision, it was established that if the requirements for the validity of the remittance were not present, an ancillary procedure should allow the parties the opportunity to present their respective cases in connection with this remittance and thereby guarantee due process and procedural equality to the parties.

D. The Interpretation of the Competence—Competence Principle

German jurisprudence is credited with the origin of the principle *Kompetenz-Kompetenz*, understood as the power enjoyed by the arbitrator or arbitral panel to rule on challenges to its jurisdiction. At the margin of the multiple critiques that have been made of such principle,[5] Mexican courts generally give precedence to court decisions rather than decisions of the arbitral tribunals with respect to its own competence. It should be noted that Mexican courts initially held contradictory positions on this issue. The contradiction lay in the decisions made by the Sixth Collegiate Court in Civil Matters of the First Circuit, which held that the validity of the arbitral award is a decision of the arbitral tribunal, and by the Tenth Collegiate Court in Civil Matters of the First Circuit, which determined that such authority rests with the judge.[6]

The Supreme Court of Justice of the Nation resolved the matter and determined that when the validity of the arbitration clause is challenged, the power to rule on the competence of an arbitral tribunal is with the judge.[7] The Supreme Court reasoned that the jurisdiction of the arbitrator arises from the free will of the parties. For example, if one of the parties is affected by legal incapacity, this defect in the free will of the parties invalidates the arbitral agreement. For this reason, if the existence of a defect in the free will of the parties is argued, the validity of the arbitration agreement must be resolved by the judicial authority.

Notwithstanding the above, it is important to note that in the case of a proceeding that challenges the validity of the arbitral agreement, the arbitrator is authorized to continue with the arbitral proceeding pursuant to article 1424 (2) of the Commerce Code, and therefore can minimize delaying tactics of one of the parties.

E. Procedural Matters in Connection with the Recognition and Enforcement of the Arbitral Award

The Mexican courts have favored speed in relation to the proceedings for recognition and enforcement of the arbitral award, as can be seen in the following court precedents:

a. In 1999, as the result of an amparo in review filed by the company Aceros San Luis, S.A. de C.V., the First Collegiate Court of the Ninth Circuit determined that prior to enforcing a commercial arbitral award issued abroad, it is necessary to produce its recognition, explaining that it would be illogical to proceed to the enforcement of the award without first deciding on its recognition.[8]

b. In 2001, as the result of an amparo in review filed by the company Jamil Textil, S.A. de C.V., the Second Collegiate Court in Civil Matters found that the

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[4] *See* Amparo in Review 14/2005, Servicios Administrativos de Emergencia, S.A. de C.V. (May 19, 2005), which ruling is contained in the decision: I.3.C.503 C, of the Third Collegiate Court in Civil Matters of the First Circuit, Ninth Period.

[5] The critiques to the *Kompetenz-Kompetenz* principle centered on considering it aberrant that a body could decide its own competence, since if it resolved that it was not competent, it would be denying itself the power to reach such determination. This idea is not shared by the author, since the nature of the principle in question requires a much more profound analysis that is not exhausted in the reasoning stated.

[6] The contradictory decisions issued by the Sixth and Tenth Collegiate Circuit Courts are analyzed in an article issued by the Mexican Arbitration Institution consisting of its posture with respect to the Court Precedent from resolution of contradictory decisions of the Supreme Court of Justice of the Nation 51/2006 on the determination of who decides on the validity of the arbitral agreement.

[7] The above is supported by the resolution of contradictory decisions No. 51/2005-PS between the Sixth and Tenth Collegiate Circuit Courts, both in Civil Matters of the First Circuit, January 11, 2006, which constitutes Court Precedent No. 25/2006.

[8] *See* Amparo in Review 29/1999, Aceros San Luis, S.A. de C.V. (August 12, 1999), which ruling is contained in the decision: 1116, of the First Collegiate Court in Civil Matters of the First Circuit, Ninth Period.

recognition and enforcement of the arbitral awards issued abroad must be done in accordance with articles 1461 — an arbitral award, whatever the country in which it has been issued, will be recognized as binding and, after the presentation of a written petition to the judge, will be enforced — and 1463 — the procedure for recognition or enforcement will be carried out as an ancillary proceeding (in accordance with article 360 of the Federal Code of Civil Procedures). Since these articles specifically and restrictively regulate these procedures and give different treatment to such awards, it is implied that the proceedings for specialized matters can be carried out through incorrect procedures, which could affect the institution of international commercial arbitration.[9]

c. In 2008, the Third Collegiate Court in Civil Matters resolved on appeal an amparo filed by Maquinaria Igsa, S.A. de C.V., declaring as valid the counterclaim of recognition and enforcement of an award filed in an ancillary proceeding to set aside the same arbitral award. For this judicial decision, the Court took into consideration the special regulation of arbitral proceedings that the possibility of the validity of the counterclaim governs as a general principle and in a second instance, in such special regulation there is no express rule that prohibits exercising the counterclaim in the ancillary setting aside proceeding. Furthermore, it made a harmonic interpretation of the Commerce Code in light of the statement of intent of the bill that included the Model Law as Mexican arbitral law. It also made a teleological analysis of the New York Convention and the Panama Convention. With this, it concluded that the counterclaim, being indicated as valid, would not threaten the purpose of the arbitral institution nor the ancillary proceeding; rather, two autonomous ancillary proceedings would be avoided, since the setting aside of the arbitral award and its recognition and enforcement would be decided in a single dispute. This results in an expedited administration of justice, thereby applying the principles of speed and effectiveness.[10]

F. Essential Characteristics of the Arbitral Award

Two relevant precedents have been issued in this regard:

a. In 2001, the Third Collegiate Court in Civil Matters of the First Circuit issued a decision establishing that the arbitral award has the effect of *res judicata* and is unchallengeable, immutable and enforceable. Further, the judge may only verify that the award is issued pursuant to the essential formalities of the proceeding. He cannot intervene on the substance of the dispute.[11] Finally, the competent judge must provide the procedural means necessary to carry out the rulings in an award, since the judge's action will be necessary to achieve the enforcement and actual carrying out of the decisions in the award.

b. In 2002, the Fourth Collegiate Court in Civil Matters of the First Circuit confirmed the interpretation that final arbitral awards are *res judicata*. Even though they must be enforced before the judicial authority, they are immutable and therefore have the same effect as a decision that is final, conclusive and has been made available for execution.[12]

From the above judicial decisions, the characteristics that the Mexican courts attribute to the arbitral award are clear, and are consistent with the most advanced principles that the leading countries in this area currently bestow on it.

G. Causes of Invalidity of the Arbitral Award

In 2005, the Third Collegiate Court in Civil Matters resolved that the causes of invalidity of an arbitration agreement are based on the content of the agreement itself. In this decision, the court found that the judge must determine only whether there is an impediment to the enforcement of the arbitral agreement.[13] Therefore, the court must demonstrate the impossibility of enforcing the arbitral award in order to declare it invalid. Futhermore, in connection with the causes of nullity of the arbitration agreement, it is important to mention the Radio Centro-Monitor case, which is a landmark in the history of arbitration in Mexico. [14] This litigation related to a procedure for setting aside an award in Mexico. The Mexican court of first instance set aside an arbitral award because it determined that it did not fulfill the requirements stipulated by the parties in the arbitral agreement. The arbitral agreement required that the arbitrators be experts in the radio broadcasting industry. The Court of first instance adopted a restrictive interpretation of the requirements stipulated by the parties with respect to the qualities required of the arbitrator. However, this decision was reviewed by a superior court, which declared the arbitral award valid because the parties consented to the appointment and qualifications of the arbitrators during the arbitration procedure. Thus, the case is now a positive example of the enforcement of arbitral awards in Mexico.

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[9] *See* Amparo in Review 4422/2001, Jamil Textil, S.A. de C.V. (September 13, 2001), which ruling is contained in the decision: 1.2. C.15 C, of the Second Collegiate Court in Civil Matters of the First Circuit, Ninth Period.

[10] *See* Amparo in Review 274/2008, Maquinaria Igsa, S.A. de C.V. (December 4, 2008), which ruling is contained in the decision: I.3.C.732 C, of the Third Collegiate Court in Civil Matters of the First Circuit, Ninth Period.

[11] *See* Direct Amparo 1303/2001, Constructora Aboumrad Amodio Berho, S.A. de C.V. (March 8, 2001), which ruling is contained in the decision: I.3.C.231 C, of the third Collegiate Court in Civil Matters of the First Circuit, Ninth Period.

[12] *See* Motion for Review No. 364/2002, Koblenz Eléctrica, S.A. de C.V. (February 22, 2002), which ruling is contained in the decision: I.4.C 54 C, of the Fourth Collegiate Court in Civil Matters of the First Circuit, Ninth Period.

[13] *See* Direct Amparo No. 465/2005, Servicios Administrativos de Emergencia, S.A. de C.V. (September 2, 2005), which ruling is contained in the decisions: I.3.C.521 C and I.3.C.522 C, of the Third Collegiate Court in Civil Matters of the First Circuit, Ninth Period.

[14] *See* Infored, S.A de C.V., José Elías Gutiérrez Vivó v. Grupo Radio Centro, S.A. de C.V., Amparo in Review 1225/2007 (January 30, 2007).

II. Conclusions

It is clear that despite the initial doubts and suspicions of Mexican courts towards arbitration, they have come to embrace it and now adopt a friendly attitude. The reasons for this change are numerous, but two of the most important ones are that Mexican courts now understand that arbitration helps to reduce their workload and that they can always verify that the arbitral awards are consistent with Mexican Public Policy and due process.

There are challenges ahead. The role of the courts has not yet expanded in practice to encompass the reception of evidence or the issuance of preliminary measures in support of arbitration (both of which are in fact provided for in the Mexican Commerce Code). We are sure, however, that Mexican courts are prepared to assume these challenges and bring creative and technically correct solutions to this type of judicial intervention during the arbitration procedures.