Arbitration - Mexico

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Introduction

As in many other jurisdictions, legal disputes in Mexico may be resolved by litigation or through alternative dispute resolution mechanisms, such as negotiation, mediation, conciliation and arbitration.

The scope of arbitration is restricted in both public and private matters. In the public sphere, arbitration cannot be used to resolve disputes relating to:

- territorial resources and territorial waters within the Mexican territory;
- the internal regime of Mexican embassies and consulates abroad; or
- resources within the exclusive maritime economic zone.

Arbitration cannot be used to resolve private disputes relating to family and civil status, agrarian issues, criminal offences, bankruptcy or labour.

Sources of law

There are three sources of law on arbitration in Mexico: national law, international law and international commercial usage and custom.

The Mexican legislation on arbitration is set out in Title IV, Book V of the Code of Commerce, which incorporates most of the provisions established in the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. It applies to domestic and international arbitration. The code was modified in 1993, just before the North American Free Trade Agreement - which encourages private arbitration - came into force on January 1 1994.

Mexico has ratified the New York Convention(1) and the Panama Convention.(2)

Institutions

The two major arbitration institutions in Mexico are the Mexican Arbitration Centre (CAM) and the Mediation and Commercial Arbitration Commission of the Mexico City National Chamber of Commerce (CANACO).

The Mexican Arbitration Centre's rules were modified on July 1 2009. They are heavily influenced by those of the International Chamber of Commerce.

Arbitral agreements

The code states that an arbitral agreement is an agreement by which the parties decide to submit to arbitration all or certain disputes which have arisen or may arise between them with regard to a defined legal relationship, whether contractual or not. An arbitration agreement may be an arbitration clause in a contract or may take the form of a separate agreement.

International or domestic arbitration?

Arbitration, whether civil or commercial, can be domestic or international. Civil arbitration is rare in practice.

Pursuant to the code, a commercial arbitration is international where the parties, at the time of executing the arbitral agreement, have business establishments in different countries. An arbitration is also international if one of the following places is located outside the state in which the parties have their business establishments:

- the place of arbitration (if determined in or pursuant to the arbitration agreement);
- a place where a substantial part of the obligations under the commercial relationship is to be performed; or
- the place with which the subject matter of the dispute is most closely connected.

Institutional or *ad hoc* arbitration?

Once a party has decided not to use the courts and to refer the dispute to arbitration, there are two main forms of arbitration. Institutional arbitration is entrusted to an arbitration institution, which administers the dispute resolution process according to its set of rules, whereas *ad hoc* arbitration is conducted independently according to rules specified by the parties.

The code allows for both institutional and *ad hoc* arbitration in Mexico.

Recognition, enforcement and annulment

Grounds for refusing the recognition or enforcement of arbitral awards are listed in Article 1462 of the code, and are essentially the same as those set out in Article 36 of the UNCITRAL Model Law.

The grounds for annulling an arbitral award, as listed in Article 1457 of the code, are essentially the same as those set out in Article 34 of the law and Article V of the New York Convention.

The grounds for refusing the recognition or enforcement of arbitral awards and the grounds for annulling an award are practically identical. The main grounds are as follows:

- The party making the application was not given proper notice of the appointment of an arbitrator or the initiation of arbitral proceedings, or was otherwise unable to present its case;
- The award purports to resolve a dispute that was not contemplated by or does not fall within the terms of the submission to arbitration, or includes decisions on matters beyond the scope of the submission to arbitration;
- The arbitral procedure or the composition of the arbitral tribunal was not in accordance with the parties' agreement; or
- The subject matter of the dispute is incapable of settlement by arbitration under Mexican law or the award is contrary to public order.

Arbitration and *amparo*

Arbitral awards are definitive and not subject to appeal. However, in order to protect the interests of individuals affected by the actions of government authorities, the Constitution provides for the *amparo* procedure - a form of judicial review. The *amparo* procedure can be defined as a remedy for breach of an individual's constitutional rights. A writ of *amparo* can be filed in opposition to laws and the actions of government authorities.

The courts have ruled that arbitrators are not authorities and therefore a writ of *amparo* cannot be filed against an arbitral award. However, a writ of *amparo* can be filed against a judge's decision to deny the recognition and enforcement of an arbitral award.

Recent legislative changes

Government regulations on infrastructure have been modified in order to promote arbitration as a dispute resolution mechanism. The Public Sector Acquisitions, Leasing and Services Law includes several provisions regarding the resolution of disputes through arbitration, but for some time no regulations were published to determine the scope of arbitrability. Fortunately, on May 28 2009 the law was modified to set out the matters that can be decided by arbitration; however, administrative rescission and early termination of agreements were not included in the arbitrable issues. On the same date, the Public Works and Related Services Law was amended to allow for the resolution of disputes by arbitration.

On June 9 2009 the Law on Chambers of Commerce and Business Alliances was modified to require chambers of commerce and business alliances to promote arbitration and other forms of alternative dispute resolution and to increase arbitration among their affiliates.

On January 27 2011 the Commerce Code was modified to include a chapter entitled "Judicial Intervention in Commercial Transaction and Arbitration", which contains several provisions regarding judicial involvement in arbitration procedures. The effects of the revision are mainly procedural; its aim is to regulate the cases and circumstances in which judicial intervention is required.

The new chapter of the code introduces changes to provisions regarding referrals to arbitration, voluntary jurisdiction, special trials and injunctions.

Referral of dispute to arbitration

The code provides that referral to arbitration must be at the request of one of the parties. The request must be made in the first writ filed by the requesting party. The judge must decide on the matter immediately. If the decision is in favour of referral, the judicial procedure must be suspended and concluded when the dispute is finally settled under the arbitration procedure. If the dispute is not settled in this manner, the parties may request the judge to continue with the judicial procedure. A judge can refuse a referral to arbitration only if:

- the arbitration agreement has previously been annulled by a court decision or arbitration award; or
- the annulment of the award or the impossibility of enforcing it is clear from the outset.

Voluntary jurisdiction

The code states that the following are subject to voluntary jurisdiction:

- requests for the appointment of arbitrators;
- requests for judicial assistance in the presentation of evidence; and
- consultations regarding tribunal fees.

Special trials

According to the code, a special trial procedure will apply for:

- decisions on a challenge against the appointment of an arbitrator;
- decisions on the competence of the arbitral tribunal (when it is determined in a resolution other than an award on the merits);
- the issuance of injunctions;
- the recognition and enforcement of injunctions issued by an arbitral tribunal;
- the annulment of commercial transactions and arbitral awards; and
- the recognition and enforcement of arbitral awards, except when such recognition or enforcement is pleaded as a defence in a trial or other procedure.

Once the claim is accepted, the judge must notify the parties and grant them 15 days in which to file a reply. If no evidence is filed, and if the judge does not deem such evidence necessary, he or she will summon the parties to a hearing on the claim within three days of the term for filing a response; otherwise, an additional 10 days will be allowed for filing evidence.

Once the hearing on the claim takes place, the judge will summon the parties to hear the decision. Intermediate resolutions and final decisions issued under this procedure are not subject to appeal.

Special trials regarding annulment, recognition and enforcement of arbitral awards can be combined before the hearing on the claim.

Injunctions

The code states that all injunctions ordered by an arbitral tribunal must be considered binding and must be enforced at the competent judge's request, unless the arbitral tribunal instructs otherwise.

Parties that request the enforcement of an injunction before a judge must give notice of the revocation, suspension or modification of the injunction.

A judge who decides on the recognition or enforcement of an injunction is entitled to request a guarantee from the requesting party.

Among other reasons, a judge may refuse the enforcement of an injunction for any of the following reasons set forth in Article 1462 of the code for rejecting recognition of an arbitral award:

- incapacity of one of the parties;
- failure to give notice of the appointment of the arbitrators;
- if it is an attempt to arbitrate a dispute that is not covered by the arbitration agreement; or
- if the arbitration procedure or composition of the arbitral tribunal are contrary to the agreement.

A judge may also refuse enforcement if:

- a guarantee requested by the arbitral tribunal has not been provided;
- the arbitral tribunal has revoked or suspended the injunction;
- the injunction is incompatible with the judge's judicial powers; or
- the enforcement of the injunction is contrary to legislation or public order.

The arbitral tribunal and the requesting party are liable for the injunction and any damages that it causes to the other party.

For further information on this topic please contact Luis Alberto Aziz Checa or Rebeca Sanchez Perez at SAI Law & Economics by telephone (+5255 59 85 6618), fax (+5255 59 85 6628) or email (laa@sai.com.mx or rsp@sai.com.mx).

Endnotes

(1) United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

(2) The Inter-American Convention on International Commercial Arbitration.