Arbitration Guide
IBA Arbitration Committee

MEXICO

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I. Background

(i) How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?

Over the past few decades, arbitration has been increasingly used in Mexico to settle large commercial disputes.

The principal advantages seen in our jurisdiction of submitting a dispute to arbitration vary depending on whether the arbitration is national or international. Regarding national arbitrations, the principal advantage is seen to be that an arbitral tribunal has greater time availability to solve a dispute, in contrast to the local courts which normally have an excessive work load. Regarding international arbitrations, the principal advantages are generally considered to be that in arbitration both parties have the possibility of solving their dispute in a neutral forum. It is also seen to be a great advantage that the dispute will be solved by a specialised tribunal with expertise in determining such cases.

Local courts are still however, used for commercial disputes as they can provide the following advantages over arbitration: (i) potentially less expense because no court fees need to be paid; (ii) the avoidance of delay in implementing interim remedies; and (iii) the avoidance of delay in the judicial enforcement of awards.

(ii) Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?

Most arbitrations are institutional and both domestic and international arbitrations are carried out involving Mexican parties.

With respect to international arbitrations, the most commonly used institutions and/or rules are those of the International Chamber of Commerce (ICC) and in domestic arbitrations, the most commonly used institutions and/or rules are those of the International Chamber of Commerce (ICC), the Mexico City National Chamber of Commerce (CANACO) and the Arbitration Center of Mexico (CAM).

(iii) What types of disputes are typically arbitrated?

Disputes most commonly arbitrated are construction disputes and commercial disputes related to the breach of contract.

(iv) How long do arbitral proceedings usually last in your country?

Arbitration proceedings normally last a year plus the enforcement stage.

(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?

There are no restrictions regarding the nationality of counsel or arbitrators, unless otherwise agreed by the parties.

II. Arbitration Laws

(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?

The law governing arbitration proceedings is contained in Book 5, Title 4 of the Mexican Code of Commerce (the Commerce Code´) which incorporates the UNCITRAL Model Law on International Commercial Arbitration (´Model Law´) with minor modifications, into the Mexican system for the resolution of commercial disputes. Certain provisions of the Model Law were first incorporated in the Commerce Code in 1989 and in 1993. In 2011 the Commerce Code was amended to incorporate the provisions of the Model Law, as amended in 2006, with minor modifications. This law applies to both domestic and international arbitrations with a seat in Mexico.

(ii) Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?

There are no distinctions between domestic and international arbitrations.

(iii) What international treaties relating to arbitration have been adopted (eg, New York Convention, Geneva Convention, Washington Convention, Panama Convention)?

Mexico is not party to the Geneva Convention or to the Washington Convention.

Mexico is party to the New York Convention of 1958, which was ratified in 1971.

Mexico is also party to the Inter-American Convention on International Commercial Arbitration (the 'Panama Convention'), which was ratified on October 27, 1977.

Mexico also ratified the Inter-American Convention of Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention) in 1987.

(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Article 1445 of the Commerce Code provides that the tribunal shall decide the controversy in accordance with the principles of law chosen by the parties. If the parties do not set forth the law that is to govern the substance of the controversy, the arbitral tribunal shall determine the applicable law, taking into account the characteristics and the nexus of the matter.

III. Arbitration Agreements

(i) Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?

Article 1423 of the Commerce Code states that the arbitration agreement shall be in writing and signed by the parties, or it may be in an exchange of letters, telexes, telegrams or faxes, or any other means of telecommunication that properly records the agreement. It may also be an exchange of a written complaint and a written answer from which the agreement can be affirmed by one party without being denied by the other. A reference made in an agreement to a document that contains a committing clause to arbitrate shall constitute an agreement to arbitrate as long as such agreement is in writing and the reference creates the implication that such clause is part of the agreement.

Furthermore, to be enforceable, the agreement must also meet the basic requirements of any contract (Article 1795, Federal Civil Code): (i) have a legal purpose; (ii) the parties' consent was not given by error, or obtained by fraud or under duress; and (iii) that the parties had full legal capacity to sign the agreement.

(ii) What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an award will not be enforced?

A judge hearing a matter that is subject to an arbitration agreement shall remit the parties to arbitration if either so petitions, unless it is shown that the agreement to

arbitrate is null and void, ineffective or impossible to perform (Article 1424, Commerce Code).

(iii) Are multi-tier clauses (eg, arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?

Multi-tier clauses are commonly used, but are not specifically regulated in the Commerce Code. There are no judicial precedents in Mexico regarding this matter. The tendency among arbitrators has been to accept the arbitration, even when the different steps have not been fulfilled.

(iv) What are the requirements for a valid multi-party arbitration agreement?

The Commerce Code contains no provision in connection with multi-party arbitration agreements and therefore, the general provisions regarding arbitration agreements are applicable (see question (i) of this section III).

(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?

Provided that both parties have agreed to confer one of the parties a unilateral right to arbitrate, then such agreement is enforceable.

(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?

There are some cases where non-signatories are bound by an arbitration agreement, for example: in the case of a subrogee (in which such person acquires the rights of the person being substituted); in the case of an heir (which inherits the rights of the person from whom he or she is inheriting); or in the case of an assignee.

IV. Arbitrability and Jurisdiction

(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?

Pursuant to Article 568 of the Federal Code of Civil Procedures, controversies arising from the following matters shall be exclusively settled by national courts: (i) land and water resources located within national territory; (ii) resources of the exclusive economic zone or resources related to any of the sovereign rights regarding such zone; (iii) acts of authority or related to the internal regime of the State and of the federal entities; and (iv) the internal regime of Mexican embassies and consulates abroad and their official proceedings.

Additionally, all family and criminal matters correspond to the exclusive jurisdiction of national courts and are therefore not arbitrable.

Arbitrability is a matter regulated by Mexican law and it is the law, which expressly confers exclusive jurisdiction to national courts regarding the abovementioned matters. Therefore, based on the law, the courts and the arbitrators are capable to decide whether a matter can be submitted to arbitration, depending on the specific case. However, courts will have the final decision regarding the arbitrability of a dispute.

Lack of arbitrability is a matter of jurisdiction.

(ii) What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?

Article 1424 of the Commerce Code provides that in the event that a court proceeding is initiated despite the existence of an arbitration agreement, the judge before whom such proceeding has been initiated shall, if either of the parties´ so request, remit the parties to arbitration, unless it is determined that the agreement to arbitrate is null and void, ineffective or impossible to enforce. If such an action has been initiated, arbitration may nevertheless be initiated or completed, and an award may be entered while the matter is pending before the judge.

Article 1464 of the Commerce Code states that in the event that either party requests remittance to arbitration pursuant to the above, the following shall be observed:

1. the request shall be made in the first written motion filed by the requesting party, regarding the merits of the controversy;

2. the judge shall issue a decision immediately, after giving the other party the opportunity to respond;

3. if the judge remits the parties to arbitration, he or she shall also order the suspension of the judicial proceedings;

4. once the controversy has been finally settled in arbitration, the judge shall terminate the judicial proceedings, upon the request of either party; and

5. if the arbitration agreement is declared to be null and void, if the arbitral tribunal is declared to be incompetent or if for any reason the controversy is not settled in arbitration, the suspension shall be lifted, upon the request of either party, provided that all parties involved must be given the opportunity to be heard;

6. No defense shall be available against the decision issued in the foregoing proceeding.

(iii) Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?

Article 1432 Commerce Code provides that an arbitral tribunal has the authority to determine its own jurisdiction and rule on any challenges regarding the existence or validity of an arbitral agreement. For such purpose, the arbitration clause in a contract shall be deemed an agreement independent of all other stipulations in the contract. A determination by an arbitral tribunal declaring a contract null and void shall not void the arbitration clause.

Any challenge with respect to the jurisdiction of the arbitral tribunal must be raised in the filing of the answer, at the latest. The parties shall not be barred from making this challenge by virtue of having appointed an arbitrator or participated in his or her appointment. Any allegation that the tribunal exceeded its powers must be asserted as soon as the matter, which allegedly exceeds the tribunal's powers, is raised during the arbitration proceeding. The tribunal may, however, in either case admit such a challenge filed after the abovementioned term has expired, provided that such delay is justified.

The arbitral tribunal may resolve the abovementioned challenges *a priori* or in the final award on the merits. If prior to the issuance of its final award, the tribunal declares itself competent, either party may request a judge to review the foregoing within thirty days after receiving notice of the declaration, and this decision shall be non appealable. While such petition is pending, the arbitral tribunal may continue to act until an award is entered.

V. Selection of Arbitrators

(i) How are arbitrators selected? Do courts play a role?

Article 1427 of the Commerce Code provides that the parties are free to agree the number and method of selection of the arbitrators, or can incorporate the rules of an arbitral institution.

However, in the absence of such agreement: (i) in the event of a sole arbitrator, if the parties are unable to reach an agreement, he or she shall be appointed by the judge, upon the request of either party; and (ii) in an arbitration with three arbitrators, each party shall appoint one arbitrator and the appointed two shall name the third one. If one party fails to name an arbitrator within thirty days from a request of the other party, or if both arbitrators named by the parties do not agree on the third arbitrator within thirty days from their designation, the appointment shall be made by the judge upon the request of either party.

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

A person who has been designated as a candidate for appointment as arbitrator must disclose all circumstances that may give rise to a justified doubt as to his or her impartiality and independence. An arbitrator shall reveal, without delay, all circumstances which could raise doubts about his or her impartiality, to the parties from the time of appointment, and during the time of the performance of the arbitration functions, unless he or she has already done so.

An arbitrator can only be challenged if there are circumstances that could raise justified doubts regarding impartiality or independence, or if he or she lacks those qualities agreed upon by the parties. A party can only challenge the arbitrator appointed by such party, or in whose appointment it has participated, for grounds that have come to its knowledge after the appointment was made (Article 1428, Commerce Code).

The parties may freely agree upon the procedure for the challenge of arbitrators. In the absence of such agreement, the party seeking the challenge shall, within 15

days from the time that the arbitral tribunal has been constituted, or 15 days from the time that the party attains knowledge of the causal facts, submit in writing the circumstances believed to justify the impeachment of the impartiality or independence, or the lack of the agreed qualifications of the challenged arbitrator. Unless the arbitrator voluntarily resigns or the other party accepts the challenge, the arbitral tribunal shall resolve the challenge of the arbitrator in question.

If a challenge is rejected, the petitioner may, within 30 days from the notice of rejection, go before the judge and request a review. During such time the arbitral tribunal, including the arbitrator being challenged, may continue with the proceedings and issue an award (Article 1429, Commerce Code).

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

Pursuant to Article 1428 of the Commerce Code, the parties may freely agree on the number, procedure of appointment and requirements applicable to arbitrators. Consequently, the only limitations are that arbitrators shall be impartial and independent.

There are no legal provisions or rules regarding the ethical duties of arbitrators.

(iv) Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?

There are no specific rules or codes of conduct concerning conflicts of interest for arbitrators. The IBA Guidelines on Conflicts of Interest in International Arbitration are only applied if the parties have previously agreed so. However, arbitral tribunals and arbitration institutions normally guide their decisions by taking these Guidelines into consideration.

VI. Interim Measures

(i) Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?

Unless otherwise agreed to by the parties, Article 1433 of the Commerce Code provides that the arbitral tribunal may, at the petition of either party, order provisional remedies which are required to protect the subject matter in dispute. In

such event, the tribunal may also require a guarantee from the party requesting the measures.

There are no specific requirements regarding the form of the tribunal's decision.

Article 1479 of the Commerce Code further provides that all interim measures ordered by an arbitral tribunal shall be recognised as binding. Unless otherwise determined by the tribunal, such interim measures shall be enforceable upon request to the courts, regardless of the stage in which they have been ordered. The party who requested or obtained the recognition or the enforcement of an interim measure shall immediately inform the judge in the event of revocation, suspension or modification of such measure. The judge, to whom the recognition or enforcement of an interim measure has been requested, can, if appropriate, order the requesting party to give a guarantee whenever the arbitral tribunal has not issued a decision regarding such guarantee or if such is necessary to protect third party rights.

(ii) Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following the constitution of the arbitral tribunal?

Yes, courts will grant provisional relief in support of arbitrations. The parties may request the judge to grant provisional relief before or during the arbitration proceedings (Article 1425, Commerce Code). Upon such request, the judge has complete discretion to adopt any interim measures he may deem appropriate (Article 1478, Commerce Code). There is no specific provision which indicates that any court ordered provisional relief will cease to have effect following the constitution of the arbitral tribunal.

(iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?

The arbitral tribunal or either party, with the arbitral tribunal's authorisation, may request the courts to grant evidentiary assistance (Article 1444, Commerce Code).

Regarding provisional relief, courts may support arbitration in this regard as noted above (see response to question (ii) of section VI).

There is no legal provision that requires the tribunal's consent regarding evidentiary assistance or provisional relief by courts.

VII. Disclosure/Discovery

(i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?

Disclosure or discovery in arbitration is used in Mexico, however there are no specific legal provisions regulating such matters.

Consequently, in the event of disclosure or discovery in arbitration, the approach by the arbitral tribunal would depend on the agreement of the parties, if any, on the institutional rules chosen by the parties and on the broad discretion of the arbitral tribunal to conduct the proceedings as it sees fit.

(ii) What, if any, limits are there on the permissible scope of disclosure or discovery?

As stated above, there are no specific legal provisions regarding the scope of disclosure or discovery and therefore, the tribunal's general power to conduct the arbitration applies, unless otherwise agreed by the parties (see response to question (iii) of section IX).

(iii) Are there special rules for handling electronically stored information?

There are no special rules.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

There is no specific provision in Mexican law regulating confidentiality specifically relating to arbitration proceedings. As the arbitration chapter contained in the Commerce Code adopts the UNCITRAL Model Law, it is silent on the issue of confidentiality of the arbitration proceeding. However, Article 1435 of the Commerce Code provides the parties with broad discretion to determine the arbitration proceedings, and therefore, the parties have the autonomy to determine the confidentiality of the arbitration. Accordingly, any confidentiality agreement included by the parties in their arbitration agreement, would be binding under Mexican law.

Under certain arbitration rules such as the arbitration rules of the Arbitration Center of Mexico (CAM) and the National Chamber of Commerce (CANACO), arbitration proceedings are confidential, unless otherwise agreed by the parties.

As a general practice, the parties will determine whether they agree on a confidential arbitration, but there are no legal provisions that contemplate any specific sanction in the event of breach of such confidentiality, other than those derived from breach of the parties' agreement.

When there is no agreement on confidentiality made by the parties or this confidentiality requirement is not made by the arbitral tribunal in a procedural order, the parties have no restriction to comment on the arbitration.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

There are no specific provisions regarding the arbitral tribunal's power to protect trade secrets and confidential information.

In practice, the power of the arbitral tribunal to protect trade secrets and confidential information, as well as the scope of such power, depends on the agreement of the parties, if any, on the institutional rules chosen by the parties and on the tribunal's broad discretion to conduct the arbitration proceedings as it sees fit.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

There are no provisions regarding privilege.

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

It is common for parties to agree on the adoption of the IBA Rules on the Taking of Evidence to govern arbitration proceedings. The arbitral tribunal will normally apply the IBA Rules on the Taking of Evidence as guidelines or as a reference point in the conduct of the proceedings.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

Unless otherwise agreed to by the parties, the arbitral tribunal shall decide if hearings are to be held for the submission of evidence or for oral argument, or whether the arbitration will be conducted based on documents and other evidence. If the parties do not agree to the waiver of hearings, the tribunal shall hold them at

the proper stage of the proceedings upon petition of one of the parties (Article 1440, Commerce Code).

There are no specific limits to the arbitral tribunal's discretion to govern the hearings, except with respect to compliance with the due process requirements.

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

There are no specific provisions under Mexican law in connection with witness testimony. Article 1435 does however, establish that the parties may freely agree on the procedure to be followed by the arbitral tribunal. In the absence of such agreement, the tribunal may conduct the proceedings as it deems appropriate. This power conferred to the arbitral tribunal includes the discretion to determine the admissibility and relevance of the evidence, and therefore, the tribunal has the power to determine, in each case, the procedural rules applicable to witness testimony.

The use of written witness statements with cross examination is common. Also direct oral examinations are used. It is common practice for arbitrators to question witnesses.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

There are no provisions under Mexican law on the matter and therefore the tribunal's general power to conduct the arbitration applies, unless otherwise agreed by the parties (see question (iii) of this section IX).

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (eg legal representative) and the testimony of unrelated witnesses?

There are no specific provisions under Mexican law, and therefore, the tribunal's general power to conduct the arbitration applies, unless otherwise agreed by the parties (see question (iii) of this section IX).

(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?

There are no specific provisions under Mexican law and therefore, the tribunal's general power to conduct the arbitration applies, unless otherwise agreed by the parties (see question (iii) of this section IX).

(vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?

In practice, it is not common for arbitral tribunals to appoint experts beside those selected by the parties.

Unless otherwise agreed to by the parties, the arbitral tribunal may appoint one or more experts to inform it on specific matters, and request either party to provide experts with all the information that is relevant or give them access to all documents, merchandise or other assets that are necessary for the inspection of such evidence (Article 1442, Commerce Code).

Additionally, Article 1443 of the Commerce Code provides that unless the parties have agreed otherwise, and if either of them so requests or the tribunal deems it necessary, after presenting their findings in writing or orally, the expert shall participate in a hearing at which the parties shall have the opportunity to question him or her and offer other experts to testify on disputed findings.

There are no requirements in the Commerce Code regarding experts being selected from a particular list.

(viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?

It depends on the arbitral tribunal. If the tribunal decides to use witness conferencing, it will normally require both parties to present a list of questions, which will be put to the witnesses to be answered simultaneously.

(ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?

There are no special rules or requirements regarding the use of arbitral secretaries, however, they are commonly used when the arbitration is complex.

X. Awards

(i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?

Pursuant to Article 1448 of the Commerce Code, the award must be in writing and signed by the arbitrators. If there is more than one arbitrator, the signatures of a majority shall be sufficient as long as the reasons why the remaining arbitrators failed to sign it are set forth in the award

The award must be reasoned in a decision, unless the parties have agreed otherwise or have reached a settlement.

The award must set forth the date in which it was issued and the place where the arbitration was held.

After the issuance of the award, the tribunal shall give notice to the parties by delivering a copy of it signed by the arbitrators.

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

Under Mexican law, damages are only compensatory. Punitive damages are not regulated and therefore, cannot be obtained.

The arbitrators can award interest but only if it was requested by the parties during the proceedings.

(iii) Are interim or partial awards enforceable?

Yes, as long as they comply with the requirements established in Article 1448 (see the response to question (i) of this section X).

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

There are no specific provisions in the Commerce Code regulating the issuance of dissenting opinions to the award. However, they are allowed in our jurisdiction and are habitually used by arbitrators.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

Pursuant to Article 1447 of the Commerce Code, if during arbitration proceedings the parties reach a settlement that resolves the controversy, the tribunal shall terminate its proceedings and if both parties so request and the tribunal does not object, shall enter the settlement in the form of an award.

Article 1449 of the Commerce Code provides that arbitration proceedings can also be terminated (other than by the issuance of an award) by an order of the arbitral tribunal if: (i) the claimant withdraws its claim, unless the defendant objects and the tribunal acknowledges the right of the defendant to obtain a final determination of the controversy; (ii) the parties agree to terminate the proceedings; or (iii) the tribunal concludes that the continuation of the proceedings would be impossible or unnecessary.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

The arbitral tribunal may correct any calculation, copying, typographical or any other errors of a similar nature in the award on its own initiative within 30 days from the date of the award. Furthermore, unless the parties agree upon a different time period, within 30 days after a final award is entered, either party may, after due notice, petition the tribunal to: (i) correct a calculation, copying, typographical or any error of a similar nature in the award; or (ii) give an interpretation of an issue or a specific part of the award, if the parties so agree. If the tribunal deems it justified, it shall make a correction or give the interpretation requested within 30 days from the receipt of the petition. Such interpretation shall form part of the award *(*Article 1450, Commerce Code).

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

Article 1455 of the Commerce Code states that the costs of arbitration shall be borne by the unsuccessful party. However, the arbitral tribunal may divide the elements of such costs on a *pro rata* basis if appropriate and considering the specific circumstances of the dispute.

Article 1455 further provides that regarding the costs of representation and legal advice, the arbitral tribunal, considering the specific circumstances of the case, shall decide which party will pay such costs or if a *pro rata* division among the parties is reasonable.

(ii) What are the elements of costs that are typically awarded?

Pursuant to Article 1416, paragraph IV of the Commerce Code, the costs include the fees of the arbitral tribunal, the travel and other expenses incurred by the arbitrators, the fees for expert advice or any other assistance required by the tribunal, travel and other expenses incurred by the witnesses if approved by the arbitral tribunal, the costs and legal fees of the prevailing party if they are claimed during the arbitration and only in an amount approved by the arbitral tribunal as reasonable and the fees and expenses of the institution that designated the arbitrators .

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

Articles 1452 and 1454 of the Commerce Code provide that if the parties have not agreed on any rules, the tribunal is entitled to decide on the arbitrators' fees, which must be reasonable, bearing in mind the following: (i) the amount in dispute; (ii) the complexity of the matter; and (iii) the time spent by the arbitrators.

The fees of each arbitrator must be indicated separately and shall be fixed by the arbitral tribunal.

Notwithstanding the foregoing, upon the request of the parties, the arbitral tribunal shall fix its fees after consulting with the judge, who may intervene and make any observations and clarifications deemed appropriate.

Article 1456 states that additionally, immediately after being constituted, the arbitral tribunal may request each party to deposit an equal amount, as an advance of the arbitral tribunal's fees, travel expenses and any other expenses of the arbitrators, as well as for the costs of expert evidence or for any other advice required by the tribunal.

During the course of the proceedings, the arbitral tribunal may request the parties to make additional deposits.

Upon the request of any of the parties, and provided that the judge agrees to do so, the arbitral tribunal may only fix the amount of such deposits or of any additional deposits, after consulting with the judge, who may make any observations to the arbitral tribunal, as he or she may deem appropriate, regarding the amount of such deposits or additional deposits.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

Article 1455 of the Commerce Code provides that the arbitral tribunal has the discretion to apportion the costs on a *pro rata* basis between the parties, if appropriate and considering the specific circumstances of the dispute.

Regarding the costs of representation and legal advice, the arbitral tribunal, considering the specific circumstances of the case, shall decide which party will pay such costs or if a *pro rata* division among the parties is reasonable.

(v) Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?

Article 1456 of the Commerce Code states that the courts may supervise the tribunal's decision on costs, upon the request of any of the parties, and provided that the judge agrees to do so. In such event, the arbitral tribunal may only fix the arbitration costs and any additional deposits, upon consultation with the judge, who may intervene and make any observations and clarifications he or she may deem appropriate

XII. Challenges to Awards

(i) How may awards be challenged and on what grounds? Are there limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?

Pursuant to Article 1457 of the Commerce Code, Arbitral awards may only be challenged and found to be void by the competent judge if:

the party requesting it proves that:

(i) one of the parties to the arbitration agreement was subject to a legal disability; the agreement is null and void pursuant to the laws chosen by the parties or pursuant to Mexican law if no other laws were chosen by the parties;

(ii) such party was not given proper notice of the designation of one of the arbitrators or of the arbitration proceedings, or was unable to assert his or her rights for any other reasons;

(iii) the award refers to a controversy not contemplated by the arbitration agreement or contains decisions, which exceed the terms of the arbitration agreement. However, if the provisions of the award, which refer to matters subject to the arbitration, can be separated from those, which are not, only the latter will be annulled; or

(iv) the integration of the arbitral tribunal or the arbitration procedures were not performed in accordance with the agreement between the parties, unless such agreement contravenes any provision of the Commerce Code, which the parties cannot waive; or, in the absence of such an agreement, the proceedings were not performed in compliance with such provisions; or

(v) the judge finds that in accordance with Mexican law, the subject matter of the controversy is not arbitrable or the award is contrary to public policy.

The petition to challenge an award shall be filed within a period of three months from the date notice is given of the award. However, in the event that either party requests the tribunal to correct any errors in the award, to give an interpretation of such award or to enter an additional award regarding claims which were presented in the proceedings but omitted from consideration in the award, the abovementioned three month period shall begin on the date that the petition was ruled on by the arbitral tribunal.

The average duration of challenge proceedings ranges from six months to one year.

If any of the parties requests the annulment or suspension of an arbitral award before the judge of the country in which such award was issued or, according to the law to which the award is subject, the judge before whom the recognition or enforcement of the award is requested may, if appropriate, postpone his or her decision and, upon the request of the party who requested the recognition or enforcement of the award, order the other party to grant sufficient guarantees (Article 1463, Commerce Code).

(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?

The right to challenge an arbitration award is a provision which does not allow waiver as it is considered to be of a public policy nature.

(iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?

Mexican courts are prohibited from reviewing the merits of a final award (See response to question (i) of this section XII).

(iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?

There is no specific provision under Mexican law on this matter. Therefore, courts may not act in this regard if the law does not give them the power to do so.

XIII. Recognition and Enforcement of Awards

(i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?

Regardless of the country in which an award has been issued, such award shall be deemed to be valid and binding and shall be enforced, upon written request to the judge. The party asserting an award or requesting its enforcement shall file the original award duly authenticated or a certified copy of it, as well as the original arbitration agreement or a certified copy of it. If the award or the agreement to arbitrate is not in Spanish, the party asserting it shall file a translation made by a certified translation expert (Article 1461, Commerce Code).

For the recognition and enforcement of awards no homologation procedure is needed. Pursuant to the Commerce Code, the recognition and enforcement of awards shall be conducted through a special procedure regarding commercial transactions and arbitration. Once the request has been filed, the judge shall summon the parties and provide them with a period of 15 days to submit an answer. Upon the expiration of such term, and if the parties do not offer any evidence and the judge does not deem it necessary, the parties shall be summoned to a pleadings hearing, which will take place within the following three days, with or without the parties presence. If the parties file evidence or if the court deems it necessary to present evidence, an evidentiary period of ten days shall be granted. Finally, the judge shall issue a final decision within five days from the hearing (Articles 1471 to 1476, Commerce Code).

Article 1462 of the Commerce Code provides that the recognition or enforcement of an award shall only be denied on the following grounds:

the party requesting it proves, before the competent judge of the country in which the recognition or enforcement is requested, that:

(i) one of the parties to the arbitration agreement was subject to a legal disability; the agreement is null and void pursuant to the laws chosen by the parties or pursuant to the law of the country in which the award was issued, if no other laws were chosen by the parties;

(ii) such party was not given proper notice of the designation of one of the arbitrators or of the arbitration proceedings, or was unable to assert his rights for any other reasons;

(iii) the award refers to a controversy not contemplated by the arbitration agreement or contains decisions, which exceed the terms of the arbitration agreement. However, if the provisions of the award, which refer to matters subject to the arbitration, can be separated from those, which are not, only the latter will be annulled;

(iv) the constitution of the arbitral tribunal or the arbitration procedures were not performed in accordance with the agreement between the parties, or that, in the absence of such agreement, they were not performed in accordance with the law of the country in which the arbitration was conducted; or

(v) the award is not yet binding upon the parties or it was annulled or suspended by the judge of the country, in which such award was issued or to which laws it was subject to; or

(vi) the judge finds that in accordance with Mexican law, the subject matter of the controversy is not arbitrable, or that the recognition or enforcement of the award is contrary to public policy.

The competent court is the court of first instance in the place where the respondent is domiciled or where the assets are located.

There is no provision in the Commerce Code regulating the stay of enforcement in the event of opposition. However, in practice such opposition stays the enforcement until a decision is issued by the competent court, but such stay does not prevent the parties from initiating a recognition and enforcement process in a different jurisdiction.

(ii) If an *exequatur* is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?

The procedure to enforce an award when an *exequatur* is obtained is to be in accordance with Articles 1461 and 1462 of the Commerce Code. Recourse to a court is possible at this stage in accordance with these provisions.

(iii) Are conservatory measures available pending enforcement of the award?

Conservatory measures are available pending enforcement of the award (Article 389 Federal Code of Civil Procedures).

(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Generally the courts welcome and favour the enforcement of national or foreign awards. There have been no reported cases on enforcement of foreign awards set aside by the courts at the place of arbitration.

(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?

Articles 1473 to 1476 of the Commerce Code state that the defendant, after being served has 15 days in which to answer the complaint. After this time period, the parties will be summoned within three days or, if evidence is submitted within ten days. There will be a hearing on closing arguments before the final decision is rendered. However, this decision may be challenged by the *amparo proceeding*.

The *amparo proceeding* is one of the particularities of the Mexican legal system. It is a constitutional remedy intended to protect constitutional rights and consists of the possibility of challenging any act of authority or law considered unconstitutional.

There are no specific provisions in the Commerce Code regarding time limits for seeking the enforcement of an award and as such, the general statutory time limits apply.

XIV. Sovereign Immunity

(i) Do State parties enjoy immunities in your jurisdiction? Under what conditions?

Even though there is no specific legislation regarding immunity, sovereign power can be derived from the Constitution (Articles 39, 40, 41 Federal Constitution of the United Mexican States).

Additionally, pursuant to the Federal Code of Civil Procedures, the institutions, services and entities of the Federal Government Public Administration, as well as the states, have the same status as any other party in judicial proceedings. Nevertheless, no enforcement or attachment orders can be imposed on them and they shall not be obliged to exhibit any guarantees in the proceedings (Article 4, Federal Code of Civil Procedures).

In 2005, a legislative initiative was received by the Senate entitled Law on State Jurisdiction Immunity´ however, it has not yet been approved. There are no treaties ratified by Mexico on this subject and the United Nations Convention on Jurisdictional Immunities of States and their Properties has not been ratified by Mexico.

(ii) Are there any special rules that apply to the enforcement of an award against a State or State entity?

There are no special rules that apply to the enforcement of an award against a State or State entity.

XV. Investment Treaty Arbitration

(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?

Mexico is not a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. Mexico is however, a party to the following multilateral free trade agreements that include provisions with respect to the protection of investments: North American Free Trade Agreement (NAFTA); Mexico-Northern Triangle Free Trade Agreement (Salvador, Guatemala and Honduras); Montevideo Treaty (Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, México, Paraguay, Peru, Uruguay and Venezuela); and the Mexico-European Free Trade Association.

(ii) Has your country entered into bilateral investment treaties with other countries?

Mexico has entered into Bilateral Investment Treaties (BITs) with the following countries; Argentina, Cuba, Panama, Trinidad and Tobago, Uruguay, Germany, Austria, Belarus, Denmark, Spain, Slovakia, Finland, France, Greece, Iceland, Italy, The Netherlands, Portugal, The United Kingdom, The Czech Republic, Sweden, Switzerland, The Benelux, Australia, China, Korea, India, and Singapore, amongst others.

XVI. Resources

(i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

Practitioners can consult the following material in order to learn more about arbitration in Mexico:

- The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958;
- The Inter-American Convention on Commercial Arbitration (´Panama Convention´);
- The Inter-American Convention of Extraterritorial Validity of Foreign Judgments and Arbitral Awards (´Montevideo Convention´);
- The Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules); and
- Book 5, Title 4 of the Mexican Code of Commerce, which is a Federal law regulating commercial arbitration in Mexico.

(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?

The International Chamber of Commerce (ICC) holds an annual seminar every summer in Mexico. Also, the Mexican Chapter of the ICC jointly with the *Escuela Libre de Derecho*, holds each year a specialised arbitration course. The Arbitration Center of Mexico (CAM) and the National Chamber of Commerce (CANACO), also organise several events related to arbitration during the year.

XVII. Trends and Developments

(i) Do you think that arbitration has become a real alternative to court proceedings in your country?

The practice of arbitration has been growing and spreading amongst all sectors of the economy and judiciary. The number of proceedings as well as the quality of such proceedings has increased over the years.

(ii) What are the trends in relation to other ADR procedures, such as mediation?

Other ADR methods, such as private mediation and conciliation, are not regulated by the Commerce Code, the Federal Civil Procedure Code or the State Civil Procedure Codes. However, there are arbitration centres (such as the National Chamber of Commerce of Mexico City) that provide the opportunity for parties to resolve their disputes through mediation. Also, there is an institute specialised in mediation, the *Instituto Mexicano de la Mediación, A.C.*

(iii) Are there any noteworthy recent developments in arbitration or ADR?

There have been two reforms to the provisions regulating arbitration contained in the Commerce Code. The first was published in the Federal Official Gazette, on 27 January 2011, and consisted of an important reform on commercial arbitration in order to regulate judicial intervention in arbitration, amongst other matters. The second reform was published on 6 June 2011 and consisted of adding a third paragraph to Article 1424.

Among the noteworthy amendments, we highlight the following:

- the inclusion of a special procedure regarding the remittance of a dispute to arbitration by a judge, as well as the grounds on which such remittance can be denied. Regarding the procedure for the submission to arbitration, the amendments provide that (i) the request shall be made in the first written motion filed by the requesting party, regarding the merits of the controversy; (ii) the judge shall issue a decision immediately, after giving the other party the opportunity to respond; (iii) if the judge remits the parties to arbitration, he or she shall also order the suspension of the judicial proceedings; (iv) once the controversy has been finally settled in arbitration, the judge shall terminate the judicial proceedings, upon the request of either party; and (v) if the arbitration agreement is declared to be null and void, if the arbitral tribunal is declared to be incompetent or if for any reason the controversy is not settled in arbitration, the suspension shall be lifted, upon the request of either party, provided that all parties

involved must be given the opportunity to be heard; and (vi) no defense shall be available against the decision issued in the foregoing proceeding;

- the inclusion of a special proceeding on commercial transactions and arbitration, regarding (i) challenge of arbitrators; (ii) competence of the arbitral tribunal; (iii) precautionary measures in arbitration; (iv) annulment of commercial transactions and arbitral awards; and (v) recognition and enforcement of an award requested as a defense in a proceeding or trial; and

- the inclusion of a provision regarding precautionary measures ordered by the tribunal, establishing that any precautionary measures ordered by the arbitral tribunal must be recognised and enforced as a general rule.

In addition to the modifications to the Commerce Code, the Public Works Law and the Public Acquisitions Law also underwent important modifications.

Until May 2009, arbitration with the government was highly restricted, as the national framework allowed only two state-owned companies – the oil company *Petróleos Mexicanos* (PEMEX) and the power company *Comisión Federal de Electricidad* (CFE) – to submit disputes to commercial arbitration.

In 2009, amendments to the Public Works Law and to the Public Acquisitions Law introduced international or domestic arbitration as a method of settling disputes arising from contracts between a private party (either Mexican or foreign) and a state entity, thereby increasing the number of arbitrations in which a Mexican state entity is a party. There are exceptions in this legislation to the arbitrability of certain matters, including administrative rescission for non-performance. Despite these exceptions, the 2009 reforms to the Public Works Law and Public Acquisitions Law represent important progress with respect to the opening of federal government contracts to alternative dispute resolution and arbitration.

Finally, it is noteworthy to mention another legislative recent change. The Public-Private Associations Law was published on January 2012, regulating public-private projects that establish long-term contractual relationships between public and private entities for rendering public services, with the infrastructure provided totally or partially by the private sector. Article 139 provides for arbitration of disputes arising under these types of agreements.

Moreover, in 2012 there have been several precedents by courts related to the interpretation of the issue of public policy. A noteworthy precedent established that in order for a court to determine whether an arbitral award contravenes public

policy, the judge must read it and conduct an analysis of its content to qualify it. However this does not imply an analysis of its content in order to review whether its considerations are correct or not, which is clearly off limits to the judge. Indeed, this judgment is a favorable precedent to the enforcement of awards in Mexico.