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Mexico

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

The formal legal requirements of an arbitration agreement are found in Article 1423 of the Mexican Code of Commerce, which provides for the general rule in most jurisdictions that an arbitration agreement must be in writing and signed by the parties in order to confirm the signatories' intention to submit their disputes to arbitration. This general rule also provides for the functional equivalence of other means to prove the parties' intention to arbitrate their disputes by the exchange of letters, telex and telegrams, among other means of communication. This includes electronic communications, which will have to fulfil the requirements provided by the UNCITRAL Model Law on electronic commerce, which Mexico adopted in 2000.

Likewise, the agreement to arbitrate may be contained in a document other than the contract which it relates to, as long as such arbitration agreement is also in writing and is expressly incorporated by reference.

Finally, if a party files a request or notice of arbitration on the basis of an inexistent arbitration agreement and the respondent party fails to object or to raise a plea with respect to such inexistence, a valid arbitration agreement will be formed between the parties and the dispute shall be settled thereupon.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Since an arbitration agreement ousts the jurisdiction of state courts with respect to disputes arising out of the underlined contract, there should be no doubt of the parties' intention to submit their disputes to arbitration.

Furthermore, since arbitration is a creature of contract, parties to an arbitration agreement must have legal capacity to execute the arbitration agreement (i.e., subjective arbitrability), and the matter to be submitted to arbitration must be capable of being settled by such means (i.e., objective arbitrability). Ideally, the parties should also detail the scope of the arbitration agreement (i.e., whether all or only certain disputes will be submitted to arbitration).

Other elements, such as whether the arbitration will be an *ad hoc* arbitration or an institutional arbitration by making reference to the relevant rules of arbitration to be applied (i.e., UNCITRAL, ICC, ICDR, CAM, CANACO, etc.), the place of arbitration, the language of the arbitration and the governing law, are highly desirable.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Mexico is generally considered as an "arbitration-friendly" jurisdiction and has a strong policy in favour of arbitration. Mexico adopted the UNCITRAL Model Law almost in its entirety and has ratified relevant International Treaties and Conventions on International Arbitration such as (i) the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, (ii) the Inter-American Convention on International Commercial Arbitration (the so-called "Panama Convention") of 1975 modelled by the European Convention in International Commercial Arbitration of 1961 (otherwise known as the "Geneva Convention"), and (iii) the Inter-American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards (the "Montevideo Convention") of 1979. Since the adoption of the UNCITRAL Model Law in 1993, the general approach of local and Federal courts has been under the principle of "no intervention", except in the narrow instances in which judicial intervention is required, giving absolute deference to the parties' intention to settle their disputes through arbitration.

The Mexican Supreme Court recognises the positive and negative effects of the arbitration agreement, therefore confirming the enforceability of such agreements, unless the dispute "pours" into public policy or public interest matters or non-arbitrable matters. By recognising the effects of the arbitration agreement, the Mexican Supreme Court has said that an arbitration agreement automatically implies and emphasises state courts' lack of jurisdiction to hear disputes that have been expressly submitted to arbitration, and are therefore required to refer the parties to arbitration when one of the parties so requests.

The following exceptions may, however, apply if: (i) the agreement is manifestly null and void or incapable of being performed (Article 1424) and therefore it will rule on its existence; (ii) the matter submitted to arbitration is not covered by the agreement; (iii) the subject matter submitted to the arbitrators is intrinsically related to other subject matters that the parties cannot dispose of and are therefore non-arbitrable; or if, furthermore, (iv) the dispute has already been decided upon by a final and binding judgment or award declaring the arbitration agreement null and void.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The Code of Commerce contains Mexico's arbitration law, which was incorporated in 1993 by adopting most of the UNCITRAL Model Law on International Commercial Arbitration. In January 2011, the Mexican Congress introduced amendments aimed at providing for more efficient proceedings for court assistance in aid of arbitration, such as in the constitution of the arbitral tribunal, adopting and enforcing interim measures of protection or measures related to evidence and proceedings for the annulment and enforcement of arbitral awards.

The governing legislation is the Code of Commerce and the international conventions already cited above. The Federal Civil Code and the Federal Civil Proceedings Code are also applicable since they foresee the matters that under Mexican law cannot be freely disposed of by the parties and are therefore inarbitrable.

It is also noteworthy that Article 17 of the Mexican Constitution was amended in 2008 to expressly provide for the citizens' use of "alternative dispute resolution" mechanisms, such as arbitration, for the resolution of disputes.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Article 1415 of the Code of Commerce states that the Code's provisions on arbitration apply indistinctively to domestic and international commercial arbitrations, public or private, when the seat of the arbitration is Mexico, unless otherwise provided by international treaties to which Mexico is a signatory or by other laws that may establish a different proceeding or that may otherwise provide that some controversies are inarbitrable.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

The Mexican arbitration law is based on the UNCITRAL Model Law.

Even though the adoption of the Model Law into the Mexican legal system provides for the true essence, spirit, and language of the former, there are some noteworthy differences: (i) while under the Mexican arbitration law, if the parties fail to agree upon the law applicable to the merits of their dispute, the arbitrators may fix it by taking into account the characteristics and connections of the case – under the Model Law, the arbitrators must apply the appropriate conflict-of-law rules that they deem applicable; (ii) while the Model Law provides that if the parties fail to agree on the number of arbitrators, the matter shall be submitted to a three-member arbitral tribunal, the Mexican arbitration law instead provides that the matter shall be submitted to a sole arbitrator; and (iii) if the parties do not agree on the costs and fees of the arbitration, the Code of Commerce incorporates provisions modelled on the UNCITRAL Arbitration Rules for the fixing of costs and fees.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Mandatory rules for arbitration (domestic and international) are incorporated in Articles 1434 and 1435 of the Code of Commerce. These Articles embody the cardinal rule in every arbitration: equal treatment of the parties; due process; the freedom of the parties to agree on the procedure to be followed by the arbitrators – and if no such agreement exists, the arbitral tribunal has the authority to conduct the arbitration in the manner it deems appropriate; and the power conferred upon the arbitrators to freely determine the admissibility and relevance of the evidence before them.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

The general approach followed by Mexican courts in determining whether or not a dispute is arbitrable is whether such dispute is a matter of public policy or expressly prevented by the Mexican legislation. The problem is that such legal notion, i.e. "public policy", has no concrete definition and should be analysed by the judge on a case-by-case basis. It is not enough to assimilate it with mandatory rules of law in order to protect the Mexican legal culture from foreign intromissions that might diminish it.

Particularly, there are subject matters which are already recognised as non-arbitrable and, therefore, as exclusive jurisdiction of the State, such as the ones cited in question 2.1, in addition to anti-trust matters, labour disputes, tax disputes, intellectual property disputes, and criminal disputes, among others like administrative and regulatory matters involving adjudication by a governmental agency.

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

The principle of *Kompetenz-Kompetenz* is recognised by Article 1432 of the Code of Commerce, which grants arbitrators the power to decide on their own jurisdiction, even when there is a plea concerning the existence or validity of the arbitration agreement. It also recognises the principle of separability of the arbitration agreement from the contract in which it may be contained.

The Code of Commerce seeks to give full effect to the arbitral agreement and to facilitate arbitration proceedings, preventing dilatory tactics from a recalcitrant party that initiates legal proceedings in breach of an arbitration agreement.

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

National courts in Mexico recognise that an arbitration agreement excludes the intervention of a national judge to resolve a dispute. If a party commences court proceedings in breach of an arbitration agreement, a judge will suspend proceedings and refer the parties to arbitration only if the opposing party requests the court to do so. Otherwise, the principle of party autonomy would be rendered meaningless.

Under these provisions, an arbitral tribunal that exercises its power derived from the *Kompetenz-Kompetenz* principle shall rule over its own jurisdiction through a preliminary award or in the final award on the merits, which can, in turn, be challenged by the contesting party to the national judge within 30 days of its notification.

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

If a party commences judicial proceedings alleging the nullity of the arbitration agreement or lack of jurisdiction of the arbitral tribunal, the judge will grant a hearing in order for the reluctant/resisting party to be heard. If the arbitral proceedings have initiated, they can proceed until the judge makes his decision regarding the validity of the arbitration agreement or the jurisdiction of the arbitral tribunal.

However, if the judge decides that the arbitration agreement is null and void, therefore ruling out the arbitrator's jurisdiction, the judge will order the suspension of the arbitral proceedings. Referral to arbitration will only be denied if: (i) there has been a prior arbitral award or a judicial judgment that firmly declares, with a *res judicata* effect, the nullity of the agreement; or (ii) if, applying a *prima facie* analysis of the arbitration agreement, its nullity, ineffectiveness, or impossible execution appears to be "notorious" to the judge.

The Code of Commerce calls for the application of a rigorous criterion of such analysis. In 2006, the Mexican Supreme Court ruled, by a 4-2 vote, that when the agreement to arbitrate is contested, it is for the court to fully examine such agreement. The Court thus rejected the alternative approach of the *prima facie* analysis, restricting the *Kompetenz-Kompetenz* doctrine. This reasoning could be said to be obsolete, because, based on the two dissenting judges' opinions on this ruling, other Collegiate Circuit Tribunals have recently ruled in favour of the pro-arbitration principle, giving full effect to the *Kompetenz-Kompetenz* principle (as seen above), and, nevertheless, the 2011 amendment to the Commercial Code rectified this deficiency.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Third parties cannot generally be compelled to arbitrate if they have not agreed to do so. Third parties, however, may be considered to be bound by an arbitration agreement when: (1) there is evidence of communications between the parties in question by which one party asserts the agreement to arbitrate and the other does not contest such submission; (2) the third party is incorporated by reference into an agreement containing an arbitration provision; and (3) there is evidence that the third party assented via the parties' communications.

Other instances in which non-signatory parties may be bound to the arbitration agreement are when there is sufficient evidence that the non-signatory party played a role in the negotiation, performance or termination of the relevant contract, where there is evidence that the non-signatory has assumed obligations under the relevant contract and in instances connected to other theories such as the so-called group of *companies* doctrine.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There is no specific statute of limitations for the commencement of arbitral proceedings. Nevertheless, the general statute of limitations for commercial matters is 10 years and a special five-year statute of limitations applies for filing actions under a company's by-laws.

According to Article 1040 of the Code of Commerce, the statute of limitations will start to run on the day in which the action may be filed.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Pending proceedings against an insolvent party, including arbitration proceedings, will not generally be suspended. Once the award is enforceable, it will be subject to express credit acknowledgment by the conciliator and the judge of the insolvency and bankruptcy proceedings.

Another type of insolvency could be one alleged to affect a party to an arbitration, such as alleging an impossibility to pay the costs and fees of the arbitration. This has been discussed at Collegiate Circuit Court level, where the circuit judges have recognised that arbitration agreements have economic consequences since costs and fees are inherent to it, and to the extent that these costs and fees are foreseen in the Code of Commerce, any kind of economic insolvency from a party or its refusal to pay its share of the costs of the arbitration, cannot in any way diminish the efficacy of the arbitration agreement.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Arbitrators have to apply the law chosen by the parties. Any reference to a specific legal order or legal system implies the application of its substantive law, and not its provision on conflict-of-law rules, unless it is otherwise agreed. If the parties did not exercise their right to choose the applicable law to their dispute, it will be up to the arbitral tribunal to do so, taking into account the characteristics and connections of the case. Such connections may be the nature of the dispute and the underlying contract, the language of the parties, the closest connection to the performance of the contract or to the subject matter of the dispute, the parties' addresses, or any other relevant connection to the arbitration agreement or the underlying contract in relation to the nature of the dispute.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Arbitrators must give full effect to the parties' choice of applicable law to the merits, unless such law conflicts with Mexican public policy.

Party autonomy in arbitration does not mean that the parties can do as they please. Usually, party autonomy sees some limitations deriving from mandatory rules of law designed to prevent certain principles that simply cannot be overlooked, such as due process, access to justice, legality and the right to be heard. Mandatory rules included in the Code of Commerce, deriving from the Model Law, and more precisely, deliberated during its *travaux préparatoires*, are the written form of the arbitration agreement, equal treatment of the parties, the obligation to notify the parties of any procedural order, the formal requirements of the arbitral award, the grounds for the termination of the proceedings or of the arbitrator's mandate, and the provisions regarding the correction and interpretation of the preliminary awards or final awards, among others.

Of course, mandatory laws on arbitrability and public policy prevail over party autonomy as well, according to the Federal Civil Code, when there has been fraudulent intent to evade fundamental principles of Mexican law.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The general rule is that the substantive law chosen by the parties governs the aspects of formation, validity, and existence of an arbitration agreement. If the seat of the arbitration is in Mexico, and the applicable law to the arbitration agreement has not been chosen by the parties, the rules of law that will govern the formation, validity, and existence of the arbitration agreement will be Mexican law. If a foreign law or international principles, such as the UNIDROIT Principles, are chosen by the parties, such law or principles will prevail.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

The parties are free to determine the number of arbitrators (uneven) and the method for their appointment. The nationality of a potential arbitrator is not an impediment, unless otherwise agreed by the parties.

The only requirement is that due process be observed and complied with in the notification related to the constitution of the arbitral tribunal.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Judicial assistance in the selection of arbitrators is available upon the parties' request (i) when they do not agree on the appointment of the sole arbitrator, or the co-arbitrator or if the parties fail to abide by the chosen method of selection, (ii) when the co-arbitrators cannot decide on the appointment of the president of the arbitral tribunal, or even when (iii) the arbitral institution does not comply with its functions. The national court shall adopt any measure necessary, such as consulting with one or many arbitral institutions or chambers of commerce, or making the appointment through a list-procedure if it deems so convenient, in order to find a suitable arbitrator.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

Yes. According to Mexican commercial rules, a national court may intervene in the selection of arbitrators (i) if the parties fail to agree upon a procedure for the constitution of the arbitral tribunal either prior to or during the commencement of the arbitration, (ii) where there is a resisting party that fails to follow the agreed upon procedure for the selection of the arbitrators, (iii) if the co-arbitrators fail to appoint the chairman of the tribunal, or (iv) if the arbitral institution selected by the parties is unresponsive or otherwise fails to appoint the arbitrators. All decisions from a state court in aid of the constitution of the arbitral tribunal may not be appealable.

The procedure to be followed for requesting a state court's intervention in the constitution of the arbitral tribunal is a summary request called *jurisdicción voluntaria* before a state court, whose final judgment cannot be appealed.

In any event, the parties retain the right to challenge the arbitrator(s) appointed by the court, in case of evidence that puts into question their impartiality and independence.

5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within your jurisdiction?

Arbitrators are bound to disclose any circumstance that may give rise to serious doubts concerning their impartiality or independence. This rule not only applies at the time of their appointment, but must be followed throughout the arbitration proceedings.

In practice, courts and arbitral institutions will also request the arbitrator to confirm his/her availability in order to ensure that the arbitrator will have the necessary time to devote to the proceedings.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Mexico's arbitration law is based upon the UNCITRAL Model Law on International Commercial Arbitration (with a few minor differences) and is applicable to both domestic and international arbitrations seated in Mexico.

Having been inspired by the UNCITRAL Model Law, Mexico's arbitration law allows parties the liberty to agree on the procedure to be followed by the arbitral tribunal. It is only in the absence of such agreement that the tribunal may conduct the proceedings as it may deem appropriate, provided that the parties are afforded a reasonable opportunity to present their case (Articles 1434 and 1435 of the Mexican Code of Commerce).

It is important to bear in mind that, like the UNCITRAL Model Law, the Code of Commerce establishes a number of default provisions that will apply in the absence of an agreement of the parties, such as the power of the arbitral tribunal to fix the language of arbitration or the law applicable to the merits of the dispute.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

As mentioned in the answer to question 6.1, parties to an arbitration seated in Mexico are free to agree on the procedure to be followed by the arbitral tribunal. However, if the parties do not reach an agreement on the procedure, the arbitral tribunal will be free to conduct the proceedings in a manner it deems appropriate, provided that the parties are treated with equality and are given a fair opportunity to present their case (Article 1434 of the Code of Commerce).

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no mandatory rules in Mexico that govern the conduct of foreign or local counsel in an arbitration proceeding. However, if the Mexican counsel is a member of a Bar association, such as the Barra Mexicana, Colegio de Abogados, A.C. or the Asociación Nacional de Abogados de Empresa, A.C., he or she will be bound by the associations' relevant code or rules of ethics and professional conduct, and therefore may be subject to any sanctions that may apply in case of breach of such codes or rules, regardless of whether the arbitration is seated in Mexico or elsewhere.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The most important power imposed upon arbitral tribunals by the Mexican arbitration law is the power to, in the absence of an agreement between the parties, conduct the proceedings as they may deem appropriate. This power conferred to the arbitral tribunal includes an absolute discretion to determine the admissibility and relevance of any evidence submitted in the course of the arbitration (Article 1435 of the Code of Commerce).

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

No. There are no provisions restricting the appearance of foreign lawyers as counsel (or arbitrators) in arbitrations seated in Mexico. Whenever foreign counsel appear in arbitrations seated in Mexico ,and where the applicable substantive law is Mexican law, they will often appear alongside a Mexican co-counsel.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

There are no Mexican laws or rules that provide for arbitrator immunity. Such provisions are regularly the product of an agreement by the parties when they submit their arbitration to a particular set of rules, such as those of the ICC.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Mexican courts' intervention is limited to acting in aid of arbitration. Under the Mexican arbitration law, courts are allowed limited powers to either assist parties to an arbitration or to control the outcome of the arbitration proceeding. While a court's power to aid parties to an arbitration is limited to the (1) constitution of the arbitral tribunal, (2) taking of evidence, and (3) granting interim protection, its power to control the outcome of an arbitration proceeding will be restricted to setting aside or enforcement proceedings.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitrator in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

Like any other Model Law jurisdiction, under the Mexican arbitration law, arbitral tribunals enjoy broad powers to grant interim relief with respect to the subject matter of the dispute. In its recent amendments, the Mexican arbitration law did not incorporate provisions that define the types of interim measures that an arbitral tribunal may grant (such as Article 17(2) of the UNCITRAL Model Law). Accordingly, arbitral tribunals (and courts) are allowed complete discretion to grant a myriad of conservatory, preliminary and interim measures of protection and relief (Article 1433 and 1478 of the Code of Commerce).

In line with the 2006 revisions to the UNCITRAL Model Law, the Mexican arbitration law was amended in 2011 to include a section dealing with enforcement of provisional measures or interim relief adopted by arbitral tribunals. Article 1479 of the Code of Commerce provides that interim or provisional relief granted by arbitral tribunals are binding upon the parties and must be recognised and enforced as such, unless the court of enforcement refuses to do so because it finds that such refusal is warranted on the grounds set forth in Article 1462, Section I (a), (b), (c) or (e) and Section II of the Code of Commerce (same grounds for refusing to enforce an arbitral award) or because the arbitral tribunal's order with respect to the provision of security in connection with the interim measure has not been complied with or the interim measure has been terminated or suspended.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Yes; under the Code of Commerce, both local and Federal courts are entitled to grant interim protection to parties subject to an arbitration agreement, prior to the commencement or during the pendency of the arbitral proceedings.

Like other Model Law jurisdictions, it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure (Article 1425 of the Code of Commerce).

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Under Article 1478 of the Code of Commerce, Mexican courts enjoy full discretion to grant any type of provisional measures in aid of arbitration. In requesting interim measures from a court, parties must follow the summary proceedings foreseen in Articles 1472 to 1476 of the Code of Commerce. While there is no black letter provision that foresees the possibility of *ex parte* interim measures, a recent precedent from a Mexican Federal Court held that *ex parte* interim measures may be essential in certain circumstances.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Mexican courts enjoy full discretion to grant any type of provisional measure. Courts will also grant provisional relief in support of arbitrations. The parties may request that a judge grant provisional relief before or during the arbitration proceedings. Upon such request, the court will have complete discretion to adopt any interim measure it may deem appropriate, including restraining a party from continuing court proceedings in breach of an arbitration agreement.

7.5 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

There are no provisions under the Mexican arbitration law that restrict courts or arbitral tribunals acting under it from ordering security for the costs of the arbitration as a form of interim relief. Given the complete discretion that courts and arbitral tribunals enjoy under the Mexican arbitration law to order any form of interim or provisional relief, an order of security for costs is considered to be among the myriad forms of relief that may be granted by an arbitral tribunal or a court in aid of arbitration.

Also, Article 1456 of the Code of Commerce allows arbitral tribunals to request each party to deposit an equal amount as an advance of the arbitral tribunal's fees and expenses, as well as costs of expert evidence. During the course of the proceedings, the arbitral tribunal may request the parties to make additional deposits.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

As indicated in question 7.1, preliminary relief and interim measures granted by arbitral tribunals are binding upon the parties and must be recognised and enforced as such (Article 1479 of the Code of Commerce).

The courts of enforcement cannot analyse the content of interim measures granted by arbitral tribunals, i.e. they lack competence to determine whether the requirements to grant the interim measures were met or not, if the interim measures were granted in accordance with the law agreed by the parties or not, if the evidence offered was sufficient to grant the measures or not, etc.

However, the courts of enforcement may refuse to enforce said interim measures if they consider such refusal to be warranted on the grounds set forth in Article 1462, Section I (a), (b), (c) or (e) and Section II of the Code of Commerce, i.e. the same grounds for refusing to enforce an arbitral award. The courts of enforcement may also refuse the referred enforcement if the arbitral tribunal's order regarding the provision of security in connection with the interim measure has not been complied with. Additionally, the courts of enforcement may refuse to enforce an interim measure if said measure has been terminated or suspended, either by the arbitral tribunal, by a court of the state in which the arbitration procedure is being heard, or under which law the interim measure was granted (Article 1480, Section I, Subsection c) of the Code of Commerce).

The Mexican arbitration law was amended in 2011 to include, *inter alia*, a specific summary procedure to request the recognition and enforcement of an interim measure (*Juicio Especial sobre Transacciones Comerciales y Arbitraje*), in accordance with Articles 1470 and 1472 of the Code of Commerce. This procedure's main characteristic is being a contentious procedure, i.e. the respondent has the right to be heard, the right to offer evidence, and the right to object and challenge the evidence offered by the party requesting the enforcement of the interim measure, among others.

While similar provisions to Articles 17 B and 17 C of the UNCITRAL Model Law which provide for the possibility of preliminary (*ex parte*) relief were unfortunately not adopted, a precedent from the Second Collegiate Court in Civil Matters of the Third Circuit published in February 2013 provides that *ex parte* interim measures are necessary to maintain the *status quo* and prevent its frustration, in spite of the legal imperative provided by Articles 1470 and 1472 of the Code of Commerce.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

There are no mandatory provisions or rules in the Mexican arbitration law regarding evidence. According to Article 1435 of the Code of Commerce, parties to an arbitration are free to agree on the procedure to be followed by the arbitral tribunal, including for evidentiary purposes. To the extent that parties do not agree on the applicable rules, the arbitral tribunal is free to determine the procedure at its own discretion. This power conferred to the arbitral tribunal includes the discretion to freely assess the admissibility and relevance of any evidence submitted in an arbitration.

Since no specific rules exist in Mexico with respect to evidence, arbitral tribunals seated in Mexico will readily refer to the IBA Rules on the Taking of Evidence in International Arbitration for guidance, even in cases where the parties have not agreed to their formal adoption in a given case. This may also be the case in domestic arbitrations which in Mexico are conducted almost identically to international arbitrations.

8.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure (including third party disclosure)?

While the production of documents is a common feature in arbitrations seated in Mexico, there are no mandatory rules on disclosure of documents. The power of arbitrators to order production of documents will ultimately depend on the agreement of the parties in such regard. If no agreement has been reached, the arbitral tribunal will have the discretion to order the disclosure of documents as it sees fit.

There is, however, no legal obligation upon the parties to comply with orders for the disclosure of documents. The only tool that an arbitral tribunal may have against this drawback is to draw adverse inferences from a party's refusal to comply with such an order.

Finally, arbitral tribunals do not have authority and cannot assume jurisdiction over individuals or entities that are not parties to the arbitration agreement. Accordingly, while arbitral tribunals may request a third party to disclose a certain document or category of documents, the arbitral tribunal has no power to either draw adverse inferences or to sanction the failure to comply with such an order.

8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

A Mexican state court may be asked to assist an arbitral tribunal in the taking of evidence. The Mexican arbitration law imposes a duty upon state courts to act in support of arbitration in the taking of

evidence when so requested by an arbitral tribunal or by the parties to an arbitration with the prior authorisation of the tribunal (Article 1444 of the Code of Commerce).

Court assistance in the taking of evidence may be necessary in the face of recalcitrant parties in order to compel the production of documents or to take the testimony of an unwilling witness.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal or is cross-examination allowed?

There are no specific provisions in connection with the production of written and/or oral witness testimony. In accordance with Article 1435 of the Code of Commerce, the parties are free to agree on the procedure to be followed by the arbitral tribunal with respect to evidence produced by a witness. In the absence of such agreement, the arbitral tribunal may conduct the proceedings as it deems appropriate and may therefore determine the procedural rules that will apply to witness testimony.

It is very common for arbitrations seated in Mexico to have the testimony of a witness be delivered by way of a written statement and/or expert reports. Witnesses and experts are then usually cross-examined by the opposing party and may also be questioned by the arbitral tribunal. Witnesses (fact or expert) are not formally sworn in but are usually made aware by the arbitral tribunal of their general duty to tell the truth, a duty that is also sanctioned by Mexican criminal law.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

There are no mandatory provisions regarding attorney-client privilege for information and documents. Mexican law imposes a general duty of confidentiality with respect to industrial and professional secrets, records and information known by professionals (accountants, lawyers, etc.) with a duty to maintain the confidentiality of their clients' information. Such privilege, however, may be deemed waived when the relevant information has been released to the public.

Given the widespread use of the IBA Rules on the Taking of Evidence, parties and arbitral tribunals seated in Mexico will readily refer to them for issues concerning documents and/or information protected by attorney-client privilege.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the Award contain reasons or that the arbitrators sign every page?

Pursuant to Article 1448 of the Code of Commerce, for an award to be validly rendered, it must (1) be in writing, (2) contain the reasons upon which it is based, (3) indicate the date and place where the award was rendered, and (4) be signed by the arbitrators. If there is more than one arbitrator, the signatures of the majority shall be sufficient for the award to be valid, provided that the remaining arbitrators' reasons for failing to sign the award are specified.

There is no requirement under the Mexican arbitration law that the arbitrators sign every page of the award in order for it to be valid.

9.2 What powers (if any) do arbitrators have to clarify, correct or amend an arbitral award?

Under the Mexican arbitration law, the arbitral tribunal may correct any minor mistake such as miscalculations, typographical errors or any errors of a similar nature incurred in the arbitral award (Article 1450, Section I of the Code of Commerce). Moreover, Article 1450, Section II of the Code of Commerce provides that the arbitral tribunal may clarify any specific part of the arbitral award. The referred measures, i.e. corrections and clarifications, are both considered part of the arbitral award.

Pursuant to Article 1451 of the Code of Commerce, the parties may request the arbitral tribunal to issue an additional award, regarding claims presented in the arbitral proceedings but omitted from the award.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Arbitral awards are considered final and binding upon the parties and are not subject to appeal. They can only be challenged in setting aside proceedings, in accordance with Article 1457 of the Code of Commerce and through the summary proceedings introduced with the 2011 amendments to the Mexican arbitration law.

Like other UNCITRAL Model Law jurisdictions, the only basis upon which an arbitral award may be set aside in Mexico is if: (a) 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 under the laws of Mexico; (b) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his case; (c) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration; (d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; (e) the court finds that the subject matter of the dispute was not capable of settlement by arbitration; or (f) the award is in conflict with the public policy of Mexico.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

There is no right to appeal an arbitral award under the Mexican arbitration law. Article 1457 of the Code of Commerce provides a set of restrictive grounds upon which an arbitral award may be challenged. The grounds provided under Article 1457 of the Code of Commerce for challenging an arbitral award are considered public policy and cannot be excluded by agreement of the parties.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

There is no right to appeal an arbitral award under the Mexican arbitration law.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

Arbitral awards cannot be appealed under Mexican law. They can be challenged on the restrictive grounds set forth in Article 1457 of the Code of Commerce (see question 10.1) following a summary procedure called *Juicio Especial sobre Transacciones Comerciales y Arbitraje* that was introduced with the amendments passed in 2011.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Yes. Mexico has been a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 1971. Mexico did not enter any reservations or declarations under articles I, X and XI of the New York Convention. Since treaties in Mexico do not require implementing legislation, the New York Convention stands alone and has been applicable in Mexico since its ratification.

However, given that Mexico followed the UNCITRAL Model Law, the relevant rules that apply to the annulment and enforcement of arbitral awards are contained in the Mexican arbitration law (Articles 1415 to 1480 of the Code of Commerce).

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Yes. Mexico is a signatory to the 1975 Inter-American Convention on International Commercial Arbitration, also known as the 1975 Panama Convention, which was ratified in 1978.

Mexico is also a party to the Inter-American Convention on Extraterritorial Effects of Foreign Judgments and Arbitral Awards, also known as the Montevideo Convention, which was ratified by Mexico in 1979.

An obscure treaty for the enforcement or arbitral awards, in civil and commercial matters, was signed by Mexico and the Kingdom of Spain in 1992. Under such treaty certain specific matters are excluded from its application such as insolvency proceedings and "nuclear matters".

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Arbitral awards are considered final and binding upon the parties by the Mexican arbitration law and must be enforced without delay, unless the court seized of an action finds reasons to refuse such enforcement (Article V of the New York Convention and Article 1462 of the Code of Commerce).

The Mexican arbitration law was amended in 2011 to include, *inter alia*, a specific summary procedure for setting aside or recognising and enforcing arbitral awards (*Juicio Especial sobre Transacciones Comerciales y Arbitraje*). In order to initiate enforcement proceedings under such summary proceedings, the party seeking enforcement must provide an original (or certified copies) of both the arbitration agreement and the award. The award and the arbitration agreement must be apostilled and translated if their original language is not Spanish.

Because local and Federal judges have concurrent jurisdiction over commercial matters, the *Juicio Especial sobre Transacciones Comerciales y Arbitraje* may be filed with the competent state or Federal court of the respondent's address or of the place where the assets are located. Once filed, the respondent will have 15 business days to answer the complaint, object to documents, etc. Once the respondent has filed its answer, the court of enforcement will summon the parties to a hearing for closing arguments, after which the decision to enforce (or refusal to enforce) must be rendered.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

As with any other judgment, arbitral awards recognised in Mexico are considered *res judicata*. Courts or arbitral tribunals will be precluded from reviewing the same issues provided that the triple identity test is satisfied (same parties, same object and same cause of action).

Under Mexican law, an arbitral award that is *res judicata* may also have mirror effects over proceedings concerning the same factual scenario (*cosa juzgada refleja*).

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The concept of public policy is yet to be defined for the purposes of international arbitration. As in many countries, scholars and judges are still undecided with respect to which concept of public policy to apply (i.e., domestic or international public policy).

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

There is no provision under the Mexican arbitration law specifically mandating the confidentiality of arbitral proceedings. Following the UNCITRAL Model Law, the Mexican arbitration law is silent on the issue of confidentiality. However, Article 1435 of the Code of Commerce gives the parties broad discretion to determine the procedure to be followed by the arbitral tribunal, including whether such proceedings must be kept confidential or not. Accordingly, any confidentiality agreement between the parties is also binding upon the arbitral tribunal.

Under certain domestic arbitration rules, such as the arbitration rules issued by the *Centro de Arbitraje de Mexico* or by the *Comisión de Mediación y Arbitraje Comercial of CANACO*, arbitration proceedings are confidential unless otherwise expressly agreed by the parties.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Unless there is an express provision on confidentiality, parties to an arbitration and arbitral tribunals or courts may rely upon the information disclosed in prior arbitral proceedings.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

There are no limits to arbitrators' powers to fashion appropriate remedies provided by law. However, under Mexican law, damages may only be compensatory, as they have to be an immediate and direct consequence of the other party's breach. Punitive damages are not regulated and, therefore, cannot be obtained.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Arbitral tribunals can award interest but only if requested by the parties during the proceedings. Parties are free to determine the interest rate that will apply to a default in payment obligations. If the parties did not agree on the applicable interest rate, the default legal annual rate provided under Mexican law is 6% for commercial obligations.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

As a general rule, the costs of the arbitration shall be borne by the losing party. The arbitral tribunal, however, has the power and discretion to allocate the costs of the arbitration between the parties if it considers it appropriate in light of the circumstances of the case (Article 1455 of the Code of Commerce).

With respect to legal costs (legal and expert fees), the arbitral tribunal shall decide which party shall bear them and in what proportion.

Notwithstanding the foregoing, the parties are free to determine any provisions regarding which party shall bear the costs of the arbitration and in what proportion. In such a case, the arbitral tribunal will be bound to such agreement and will not have discretion in their allocation.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Awards are, in and of themselves, not subject to tax, duties or levies.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

There are no restrictions to the funding of claims by third parties. Contingency fees are legal in Mexico.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Mexico is not a Member State of the "ICSID" Convention.

Nevertheless, it is noteworthy to state that, even though Mexico did not sign nor ratify the Washington Convention, Mexico has access to ICSID's "Additional Facility Rules" as is provided by several BITs and other treaties such as NAFTA.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Mexico has signed 32 Bilateral Investment Treaties, and 10 Investment Chapters included in the related Free Trade Agreements. As of 2013, 10 new BITs are being negotiated.

Mexico is not a member of the Energy Charter Treaty.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

The "fair and equitable treatment" principle, customary of international investment law, is provided for in clauses such as:

1. The National Standard: the principle of giving others, in this case foreign investors, the same treatment as Mexican investors in similar circumstances.
2. The Most-Favoured-Nation Standard: the principle of not discriminating between one's trading partners.
3. The Minimum Standard: Mexico provides to investments of foreign investors treatment in accordance with international law, including fair and equitable treatment, security, and full protection.
4. Free Transfer of Currency: an investor in Mexico may freely make transfers of funds related to its investments (such as profits, dividends, interests and royalty payments) freely and without delay.
5. Prohibition of Performance Requirements: Mexico cannot impose or enforce performance requirements, such as export requirements and domestic content rules, in connection with receiving an advantage or incentive.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Mexico does not recognise the principle of state immunity as, for example, the United States does.

15 General

15.1 Are there noteworthy trends in or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

The 2011 amendments to the Mexican arbitration law have been largely successful, especially those concerning the enforcement of provisional or interim measures issued by arbitral tribunals and the discretionary power of state courts to fashion any interim or provisional measure as may be required by the case at hand (Article 1478 of the Code of Commerce). Such discretionary power has finally put the argument that state courts acting in aid of arbitration were only able to grant the provisional remedies (*providencias precautorias*) foreseen under Mexican procedural law to rest.

By far the most common types of disputes that are being referred to arbitration in Mexico are those related to infrastructure projects, construction contracts, shareholder and joint venture agreements, and contracts for the sale of goods.

A recent trend shows a marked shift towards including arbitration clauses in franchise agreements and corporate by-laws to provide for the resolution of intra-corporate disputes.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

ICC arbitration remains a first pick for institutional arbitration among Mexican parties. The 2012 ICC Rules of Arbitration have been highly praised for the inclusion of explicit provisions concerning efficient case management and those destined to improve time and cost efficiency of ICC arbitration.

The local arbitration institutions have also gone a long way in furthering the use of arbitration in Mexico. For example, the *Centro de Arbitraje de México* (CAM) – whose rules of arbitration are modelled upon the ICC Rules of Arbitration (1998) – recently teamed up the Mexican Association of Franchises in order to cater to the growing interest in arbitration within the franchise industry.

In its own front, the long standing *Comisión de Mediación y Arbitraje Comercial of CANACO* continues to promote the use of arbitration for the resolution of any type of commercial dispute, and has recently published a set of rules for low cost arbitrations.

Similarly, the newly founded *Centro de Arbitraje de la Industria de la Construcción* (CAIC) has included provisions in its Rules of Arbitration that provide for several streamlined proceedings, not only for low-cost arbitrations but also for fast-track arbitrations.

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Von Wobeser y Sierra, S.C. is a dynamic firm characterised by the combination of experience and youth of our members. In addition, most of our partners and lawyers have studied abroad, which allows them to fully understand the international legal environment and have a richer and more open perspective on the Mexican legal system. These factors have permitted us to develop for our clients innovative and properly grounded legal strategies.

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