Commercial Arbitration 2018

Mexico

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gar know-how

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Infrastructure

1 The New York Convention

Is your state a party to the New York Convention? Are there any noteworthy declarations or reservations?

Mexico is party to the New York Convention of 1958, which was ratified in 1971. Mexico made no declarations or reservations upon the execution of the New York Convention.

2 Other treaties

Is your state a party to any other bilateral or multilateral treaties regarding the recognition and enforcement of arbitral awards?

Mexico is party to the Inter-American Convention of Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention), which was ratified in 1987 and is also party to the Panama Convention.

In January 2018, Mexico finally signed the ICSID Convention. It should be noted that due to Mexico's policy regarding free trade and investment protection treaties, it was an inexplicable anomaly that Mexico was not party to ICSID. This anomaly has now been corrected.

3 National law

Is there an arbitration act or equivalent and, if so, is it based on the UNCITRAL Model Law? Does it apply to all arbitral proceedings with their seat in your jurisdiction?

The law governing arbitration proceedings is the Commerce Code and it incorporates the UNCITRAL Model Law on arbitration, with minor modifications. Such code applies to all arbitral proceedings brought in Mexico relating to commercial disputes.

In addition, in 2011 the Commerce Code was amended to update and clarify the legal proceedings that should be followed in all the ancillary proceedings and other requests made to the courts by the parties when the judicial intervention is required.

4 Arbitration bodies in your jurisdiction

What arbitration bodies relevant to international arbitration are based within your jurisdiction? Do such bodies also act as appointing authorities?

The main arbitration bodies based within Mexico are the following:

- the Mexican Chapter of the International Chamber of Commerce, a non-profit institution formally established in 1985, with its offices in Indiana at 260, 5th level, office 508, Col. Ciudad de los Deportes, CP 03810, Mexico City, Federal District, www.iccmex.org.mx;
- the Arbitration and Mediation Commission of the Mexico City Chamber of Commerce (CANACO), a non-profit organisation based at Paseo de la Reforma no. 42, Delegación Cuauhtémoc, CP 06040, Mexico City, Federal District (see www.arbitrajecanaco.com.mx); and
- the Mexican Arbitration Center (CAM), created in 1997, with its offices in Tecnológico de Monterrey, Campus Santa Fe, Av. Carlos Lazo No. 100, Edificio Aulas 1, Nivel 5, Col. Santa Fe, México, Federal District, CP 01389.

The above-mentioned arbitration bodies can act as appointing authorities, with prior agreement of the parties.

5 Foreign institutions

Can foreign arbitral providers operate in your jurisdiction?

Yes, there is no restriction for foreign arbitral providers to operate in Mexico, however, they can only operate in arbitration and not before courts unless they are officially recognised and authorised as lawyers before Mexican authorities.

6 Courts

Is there a specialist arbitration court? Is the judiciary in your jurisdiction generally familiar with the law and practice of international arbitration?

There is no specialist arbitration court; however, arbitration-related matters are brought before the first instance civil courts.

The judiciary in Mexico is generally familiar with the law and practice of international arbitration. However, the most experienced courts in Mexico in arbitration matters are the Federal Courts at Mexico City.

Agreement to arbitrate

7 Formalities

What, if any, requirements must be met if an arbitration agreement is to be valid and enforceable under the law of your jurisdiction? Can an arbitration agreement cover future disputes?

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 record 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 (article 1423, Commerce Code).

Furthermore, to be enforceable, the agreement must also meet the following other basic requirements of any contract:

- it has a legal purpose;
- the parties' consent was not given by error, or obtained by fraud or under duress; and
- the parties had full legal capacity to sign the agreement.

Pursuant to the Commerce Code, arbitration agreements can cover both controversies that have arisen and controversies that may arise in the future (article 1416, Commerce Code).

8 Arbitrability

Are any types of dispute non-arbitrable? If so, which?

Pursuant to the Federal Code of Civil Procedures, controversies arising from the following matters shall be exclusively settled by national courts (article 568, Federal Code of Civil Procedures):

- land and water resources located within national territory;
- resources of the exclusive economic zone or resources related to any of the sovereign rights regarding such zone;
- acts of authority or related to the internal regime of the State and of the federal entities; and
- 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. The Law of Public Works and Related Services, as well as the Law of Acquisitions, Leases, Services of the Public Sector have expressly excluded from arbitration any dispute regarding the validity of the administrative rescission or the early termination of any contract entered into by public entities with private parties which fall under the scope of these laws.

It is important to mention that in the recent reforms in the oil and gas and electric legislation arbitration is allowed between private parties and the oil (PEMEX) and electricity (CFE) companies of the Mexican government without any restriction. These arbitrations could be subject to foreign laws if the performance of the relevant agreement is executed abroad.

Moreover, exploration and oil extraction contracts with the Regulatory Energetic Commission could also be subject to arbitration with the limitation that the rescission of these contracts could not be subjected to arbitration.

9 Third parties

Can a third party be bound by an arbitration clause and, if so, in what circumstances? Can third parties participate in the arbitration process through joinder or a third-party notice?

There is no specific provision regulating a circumstance where third parties (non-signatories) are bound by an arbitration agreement. In fact, if they have not signed or consented to an arbitration agreement, they could not be deemed to be bound by it. Consent is essential under Mexican law to be bound by an arbitration agreement. However, since Mexican law allows the consent to be construed pursuant to the conduct assumed by a party, it would not be strictly necessary to have a signed agreement to bind a third party to an arbitration. If there is enough evidence to support that said party consented to the arbitration, then that would be enough to bind it.

10 Consolidation

«Would an arbitral tribunal with its seat in your jurisdiction be able to consolidate separate arbitral proceedings under one or more contracts and, if so, in what circumstances?

There are no specific provisions on this matter, so that would entirely depend on the consent of the parties of each arbitral proceeding and the willingness of the arbitral tribunal to consolidate the different proceedings.

11 Groups of companies

Is the "group of companies doctrine" recognised in your jurisdiction?

There is no "group of companies doctrine" under Mexican law and no other method of piercing the corporate veil is recognised. In fact, Mexican law prohibits the piercing of corporate veil in commercial disputes (although some recent court precedents appear to open the door to admit said possibility for antitrust matters). Notwithstanding, if a party can prove that within a group of companies several of them participated in the performance of an agreement just signed by one of them and that they have acted and consented to the arbitration clause contained in it, then binding them to the arbitration would be allowed by Mexican law.

12 Separability

Are arbitration clauses considered separable from the main contract?

Yes, pursuant to the Commerce Code, an arbitration clause included within the wording of a contract shall be deemed as an agreement independent from the other stipulations of the contract. In the event that the arbitral tribunal declares the main contract to be null and void shall not entail the nullity of the arbitration clause (article 1432, Commerce Code).

13 Competence-competence

Is the principle of competence-competence recognised in your jurisdiction? Can a party to an arbitration ask the courts to determine an issue relating to the tribunal's jurisdiction and competence?

Yes, the competence-competence principle is recognised. An arbitral tribunal has the authority to determine its own jurisdiction and rule on any defences regarding the existence or validity of an agreement for arbitration. 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. If a party brings a claim before a court challenging the jurisdiction of the Arbitral Tribunal, it must remit the parties to arbitration, unless it is proven that the arbitration clause is null, ineffective or unenforceable.

Within the arbitration proceeding, the defence of lack of jurisdiction of the arbitral tribunal must be raised before the filing of the answer. The parties shall not be barred from asserting this defence by virtue of having appointed an arbitrator or participated in his or her appointment. The defence that the tribunal exceeded its authority must be asserted as soon as it is raised or when it so appears during the arbitration proceeding. The tribunal may, however, in either case admit a defence filed after the above-mentioned term has expired, provided that such delay is justified.

The arbitral tribunal may resolve the above-mentioned defences 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 30 days of receiving notice of the declaration, and his decision shall be non-appealable. While such petition is pending, the arbitral tribunal may continue to act until an award is entered (article 1432, Commerce Code).

14 Drafting

Are there particular issues to note when drafting an arbitration clause where your jurisdiction will be the seat of arbitration or the place where enforcement of an award will be sought?

There are no specific requirements regarding the drafting of the arbitration clause, except for those established in article 1423 of the Commerce Code (see question 7).

15 Institutional arbitration

Is institutional international arbitration more or less common than ad hoc international arbitration? Are the UNCITRAL Rules commonly used in ad hoc international arbitrations in your jurisdiction?

Institutional international arbitration is more common than ad hoc international arbitration. In ad hoc international arbitrations, the UNCITRAL Rules are commonly used.

16 Multi-party agreements

What, if any, are the particular points to note when drafting a multi-party arbitration agreement with your jurisdiction in mind? In relation to, for example, the appointment of arbitrators.

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 7). In any event, what it is highly advisable is to be sure to give the parties the possibility of participating in the arbitration in a fair and equitable manner ensuring the major reciprocity of rights possible.

Commencing the arbitration

17 Request for arbitration

How are arbitral proceedings commenced in your jurisdiction? Are there any key provisions under the arbitration laws of your jurisdiction relating to limitation periods of which the parties should be aware?

An arbitration is usually commenced following the rules of institutional arbitrations (with the filing of a request for arbitration or a complaint and with the appointment of the arbitral tribunal). In ad hoc arbitrations, arbitration is usually commenced with the proceeding to appoint the sole arbitrator or the arbitral tribunal and the filing of an arbitration complaint.

In connection with the statute of limitation, in general terms there is a 10-year period to bring a commercial action before courts.

Choice of law

18 Choice of law

How is the substantive law of the dispute determined? Where the substantive law is unclear, how will a tribunal determine what it should be?

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 (article 1445, Commerce Code).

Appointing the tribunal

19 Choice of arbitrators

Does the law of your jurisdiction place any limitations in respect of a party's choice of arbitrator?

The parties are free to agree the number and method of selection of the arbitrators, or can incorporate the rules of an arbitration institution (article 1427, Commerce Code).

The only limitations are that arbitrators shall be impartial and independent (article 1428, Commerce Code).

20 Foreign arbitrators

Can non-nationals act as arbitrators where the seat is in your jurisdiction or hearings are held there? Is this subject to any immigration or other requirements?

There are no restrictions regarding the nationality of arbitrators, unless otherwise agreed by the parties. There are no provisions regarding immigration requirements.

21 Default appointment of arbitrators

How are arbitrators appointed where no nomination is made by a party or parties or the selection mechanism fails for any reason? Do the courts have any role to play?

In the event that no nomination is made by a party or parties regarding the selection of arbitrators, the following mechanism shall apply (article 1427, Commerce Code):

- In the event of a sole arbitrator, if the parties are unable to reach an agreement, he shall be appointed by the judge, prior request of either party;
- in arbitrations 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 30 days from a request of the other party, or if both arbitrators named by the parties do not agree on the third arbitrator within 30 days from their designation, the appointment shall be made by the judge upon request of either party.

If during the agreed procedure for the appointment, one of the parties does not act in accordance with the stipulated agreement, or the parties or the arbitrators cannot reach an agreement regarding the procedure to be followed, or a third party, including an institution, does not comply with the functions that have been assigned to it by the agreement, either party may petition the judge to adopt the necessary measures, unless the agreement for the procedure for appointment has provided for other means to determine a third arbitrator.

22 Immunity

Are arbitrators afforded immunity from suit under the law of your jurisdiction and, if so, in what terms?

There are no legal provisions regarding immunity of arbitrators. However, it has been recognised by several judicial precedents that an arbitrator is not considered a public officer analogous to a Judicial Court and consequently, decisions by arbitrators do not constitute acts of authority. Based on the foregoing criteria, arbitrators are not liable for the legal consequences of the awards issued by them or for any errors of law contained in such awards.

Notwithstanding the above, it is important to point out that the Commerce Code does make the members of the Arbitral Tribunal

responsible for any damage caused by the unduly or illegal granting of provisional measures within an arbitration.

23 Securing payment of fees

Can arbitrators secure payment of their fees in your jurisdiction? Are there fundholding services provided by relevant institutions?

There are no specific provisions regarding security of fees, however, article 1456 of the Commerce Code establishes that immediately after being integrated, the arbitral tribunal may request each party to deposit an equal amount, as 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 require by the tribunal.

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

Prior 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, prior consultation with the judge, who may intervene and make any observations and clarifications he may deem appropriate.

If the fees have not been deposited by the parties within 30 days from the tribunal's request, the arbitral tribunal shall ask the parties to make the corresponding deposits. In the event that such deposits are not made, the tribunal may order the suspension or the termination of the arbitration.

There are no fundholding services provided by relevant institutions.

Challenges to arbitrators

24 Grounds of challenge

On what grounds may a party challenge an arbitrator? How are challenges dealt with in the courts or (as applicable) the main arbitration institutions in your jurisdiction? Will the IBA Guidelines on Conflicts of Interest in International Arbitration generally be taken into account?

An arbitrator may only be challenged if there are circumstances that generate justified doubts regarding the arbitrator's impartiality or independence, or if he does not possess the characteristics previously agreed by the parties. A party may only challenge the arbitrator appointed by such party, due to causes arising after the appointment (article 1428, Commerce Code).

The parties may freely agree on the procedure for the challenge of arbitrators. In the absence of such agreement, the party seeking the challenge shall, within 15 days form 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 he believes 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 form the notice of rejection, go before the judge and request a review. The judge's decision is not appealable. During such time the arbitral tribunal, including the arbitrator being challenged, may continue with the proceedings and issue an award (article 1429, Commerce Code).

The IBA Guidelines on Conflicts of Interest in International Arbitration are only applied if the parties have previously agreed so.

Interim relief

25 Types of relief

What main types of interim relief are available in respect of international arbitration and from whom (the tribunal or the courts)? Are anti-suit injunctions available where proceedings are brought elsewhere in breach of an arbitration agreement?

Unless otherwise agreed by the parties, the arbitral tribunal may, prior request of either party, order provisional remedies which are necessary to protect the subject matter in dispute. In such event, the tribunal may also require a guarantee from the party requesting the measures (article 1433 of the Commerce Code).

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 request for recognition or enforcement of an interim measure has been addressed, 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 (article 1479 of the Commerce Code).

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 (article 1425 of the Commerce Code). Upon such request, the judge has complete discretion to adopt any interim measures he or she may deem appropriate (article 1478 of the Commerce Code). Therefore, all types of measures without any limitation are allowed. It is important, however, to mention that in order to grant any provisional remedy or relief a special lawsuit should be carried out which may take from four to six months to get resolved, so the duration of this process may render impractical to seek this kind of remedy before courts, when its urgency is essential.

Notwithstanding the above, anti-suit injunctions are not allowed as such, since the right to access to court is considered a fundamental right which cannot be restricted. In this regard, Mexican courts have sustained that under Mexican law it is forbidden to impede a party to file an action exercising its rights to enforce an award.

If a party brings a claim before a court in breach of an arbitration clause, the existing remedy would be that the defendant may ask the court to remit the parties to arbitration and suspend the court procedure.

26 Security for costs

Does the law of your jurisdiction allow a court or tribunal to order a party to provide security for costs?

Even though the Commerce Code does not contain any specific provisions regarding security for costs, however, article 1456 allows the arbitral tribunal to 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 request by 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, with prior consultation with the judge, who may intervene and make any observations and clarifications he or she may deem appropriate (article 1456 of the Commerce Code).

Procedure

27 Procedural rules

Are there any mandatory rules in your jurisdiction that govern the conduct of the arbitration (eg, general duties of the tribunal and/or the parties)?

The Commerce Code establishes 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 may deem appropriate, but always following the general guideline of due process which allows both parties to be treated equally and to have a full opportunity to exercise their rights. 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 (article 1435, Commerce Code).

28 Refusal to participate

What is the applicable law (and prevailing practice) where a respondent fails to participate in an arbitration?

Unless otherwise agreed to by the parties, if the respondent fails to participate in an arbitration, the arbitral tribunal shall continue the proceedings. However, such failure to participate shall not be considered as consent of the claimant's pleadings (article 1441, Commerce Code).

Furthermore, in the event that either party fails to appear in a hearing or fails to file any evidence, the arbitral tribunal may continue the proceedings and issue a final award based on the evidence presented.

29 Admissible evidence

What types of evidence are usually admitted, and how is evidence usually taken? Will the IBA Rules on the Taking of Evidence in International Arbitration generally be taken into account?

The Commerce Code establishes 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 may deem 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 (article 1435, Commerce Code).

The adoption of the IBA Rules on the Taking of Evidence, to govern arbitration proceedings is very common and even if in cases where the parties have not agreed on their adoption, the Rules are often used as a guide by the arbitral tribunal.

30 Court assistance

Will the courts in your jurisdiction play any role in the obtaining of evidence?

The arbitral tribunal or either party (prior authorisation of the tribunal) may request the presence of the judge for the filing of evidence (article 1444, Commerce Code).

31 Document production

What is the relevant law and prevailing practice relating to document production in international arbitration in your jurisdiction?

There is no specific law regarding document production in international arbitration in Mexico, therefore the arbitration rules chosen by the parties in each particular case apply.

32 Hearings

Is it mandatory to have a final hearing on the merits?

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 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).

33 Seat or place of arbitration

If your jurisdiction is selected as the seat of arbitration, may hearings and procedural meetings be conducted elsewhere?

Regardless of the place of arbitration, the arbitral tribunal may, unless otherwise agreed by the parties, conduct hearings and/or procedural meetings anywhere else (article 1436, Commerce Code).

Award

34 Majority decisions

Can the tribunal decide by majority?

Yes. Pursuant to the Commerce Code, if there is more than one arbitrator, the signatures of a majority shall be sufficient to issue a decision, as long as the reasons of why the remaining arbitrators failed to sign are set forth (article 1448, Commerce Code).

35 Limitations to awards and relief

Are there any particular types of remedies or relief that an arbitral tribunal may not grant?

No, arbitral tribunals may grant any type of remedy or relief and its sole limitation would be its inability to grant enforcement relief, since such would necessarily be requested to a court.

36 Dissenting arbitrators

Are dissenting opinions permitted under the law of your jurisdiction? If so, are they common in practice?

Even though the Commerce Code does not contain any specific provisions regarding dissenting opinions to the award, article 1448 states that in arbitration proceedings conducted by more than one arbitrator, the award must contain the signatures of the majority, provided that reasons why the remaining arbitrators failed to sign it are set forth in the award.

37 Formalities

What, if any, are the legal and formal requirements for a valid and enforceable award?

Pursuant to 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 are set forth (article 1448, Commerce Code).

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

The award shall set forth the date it was entered and the place where the arbitration was held.

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

38 Time frames

What time limits, if any, should parties be aware of in respect of an award? In particular, do any time limits govern the interpretation and correction of an award?

Unless the parties agree upon a different time period, within 30 days after a final award is entered, either of them may, after due notice to the other party, request the tribunal (article 1450, Commerce Code):

- to correct an error of calculation, copying, typographical or of a similar nature in the award; the arbitral tribunal may correct any errors of calculation, copying, typographical or of a similar nature of the award on its own initiative within 30 days from the date of the award.
- to give an interpretation upon an issue or upon 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 an integral part of the award.

Additionally, unless otherwise agreed by the parties, either party may, within 30 days from the reception of the award and prior notice to the other party, request the arbitral tribunal to issue an additional award regarding any requests or pleadings included in the proceedings, but omitted in the final award. If the tribunal considers such request to be justified, it shall issue the additional award within 60 days (article 1451, Commerce Code).

The above-mentioned time limits may be extended by the arbitral tribunal, if necessary (article 1451, Commerce Code).

Costs and interest

39 Costs

Are parties able to recover fees paid and costs incurred? Does the "loser pays" rule generally apply in your jurisdiction?

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, Commerce Code).

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.

40 Interest on the award

Can interest be included on the principal claim and costs? Is there any mandatory or customary rate?

The arbitrators can award interests only if they were requested by the parties during the proceedings and according to the rate established in such request.

If the interest rate is not specified by the parties, the legal interest rates shall apply. The legal interest rate in commercial matters is 6 per cent. In civil matters, the legal interest rate is 9 per cent.

Challenging awards

41 Grounds for appeal

Are there any grounds on which an award may be appealed before the courts of your jurisdiction?

Mexican courts are prohibited from reviewing the merits of a final award, but may set aside an award on one of the following grounds (article 1457, Commerce Code):

1 the party requesting it proves that:
   - one of the parties to the arbitration agreement was subject to a legal disability; the agreement is invalid pursuant to the laws that were designated; or if no other laws were designated, is invalid under Mexican law;
   - such party was not given proper notice of the designation of one of the arbitrators or of the arbitration proceedings, or was impaired by any other reasons to assert his rights;
   - the award refers to a controversy not contemplated within 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
   - the panel of the arbitral tribunal or the arbitration procedures were not conducted in accordance with the agreement between the parties, unless such agreement is in conflict with the provisions of the Commerce Code, which the parties cannot waive; or, in the absence of such an agreement, the proceedings were not in conformity with such provisions.
2 the judge finds that in accordance to Mexican law, the object of the controversy is not subject to arbitration, or the award is contrary to public policy.

It is worth mentioning that the Supreme Court of Justice has issued several precedents indicating that when assessing the violation of public policy in administrative contracts the judge should evaluate the legal effects and consequences of the decisions contained in an arbitral award. Therefore, the judge cannot re-analyse the merits of the case based on the allegation of a breach of public policy, but only determine if the decisions contained in the award could directly affect the fundamental values and principles of the Mexican legal system.

The petition to vacate 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 of the award, to give an interpretation of such award or to enter an additional award, regarding claims that 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 goes from six months to one year.

Furthermore, if a petition for the annulment of an award has been filed to a judge, such judge may suspend the annulment proceedings upon the petition of one of the parties, requesting a specific time period for the arbitral tribunal to continue with those proceedings, or adopt any measures in its judgment that will resolve the causes of the annulment petition (article 1459 of the Commerce Code).

42 Other grounds for challenge

Are there any other bases on which an award may be challenged, and if so what?

No.

43 Modifying an award

Is it open to the parties to exclude by agreement any right of appeal or other recourse that the law of your jurisdiction may provide?

There is no provision on this matter and in general terms, the awards are deemed final and binding and it is not common that the parties agree otherwise. In connection with the nullification procedures, we consider that unless the cause of nullification is referred to public policy, the parties are entitled to waive the nullification of the award.

Enforcement in your jurisdiction

44 Enforcement of set-aside awards

Will an award that has been set aside by the courts in the seat of arbitration be enforced in your jurisdiction?

There is no mandatory provision in this regard. The Mexican Court have discretionary power to decide if they may enforce a nullified award. In any event, the party against whom the award has been invoked must prove that such an award has been set aside or declared null by the courts in the seat of arbitration in order for the Court to grant its discretionary power to enforce or reject the enforcement (article 1462, Commerce Code).

45 Trends

What trends, if any, are suggested by recent enforcement decisions? What is the prevailing approach of the courts in this regard?

Courts tend to favour enforcement of awards, unless such enforcement entails a violation of due process. In this regard, Mexican courts have rejected arguments which may invite them to revisit the merits of the dispute. In fact, recently there have some decisions of Mexican courts denying the nullification of awards based on allegations of breach of public policy which intend to revisit the merits of the case.

46 State immunity

To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?

Even though there is no specific legislation regarding immunity, the sovereign power can be asserted from the Mexican Constitution (articles 39, 40 and 41). 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 to them and they shall not be obliged to exhibit any guaranties (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, the United Nations Convention on Jurisdictional Immunities of States and their Properties" has not been ratified.

As has been mentioned while explaining the arbitrability under Mexican law, there is also an implicit and partial immunity recognised in favour of the administrative rescission of public contracts by governmental entities (with the exception of PEMEX and CFE). A national court in an administrative or constitutional proceeding and not in arbitration can only hear this type of administrative rescission.

Further considerations

47 Confidentiality

To what extent are arbitral proceedings in your jurisdiction confidential?

There is no provision in Mexican law specifically regulating the confidentiality of arbitration proceedings. As the arbitration chapter of the Commerce Code adopts the Model Law, it is silent on the issue of confidentiality of arbitration proceedings. However, article 1435 of the Commerce Code gives the parties a broad discretion to determine the arbitration proceedings, and therefore the parties have the authority to decide whether the arbitration should be confidential. Accordingly, any confidentiality agreement included by the parties in their arbitration agreement would be binding on the arbitrators as well.

Under certain arbitration rules, such as the arbitration rules of CAM and CANACO, arbitration proceedings are confidential, unless otherwise agreed by the parties.

48 Evidence and pleadings

What is the position relating to evidence produced and pleadings filed in the arbitration? Are these confidential? Is there any way that they might be relied on in other proceedings (whether arbitral or court proceedings)?

As mentioned above, the practice is that arbitration in general and all evidence and pleadings filed in connection therewith are confidential. However, there is no specific legal provision establishing an obligation of confidentiality.

49 Ethical codes

What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your jurisdiction?

There are no specific legal provisions or rules regarding ethical duties of arbitrators. However, independence and impartiality are features required by the Commerce Code. Moreover, the Mexican Bar Association has an ethical code that is followed by most of the Mexican forum related to arbitration.

50 Procedural expectations

Are there any particular procedural expectations or assumptions of which counsel or arbitrators participating in an international arbitration with its seat in your jurisdiction should be aware?

In general, the approach of local courts to the recognition and enforcement of awards is favourable to arbitration. In fact, for purposes of using the amparo (constitutional proceeding) to revisit the merits of an award, recent precedents have tended to consider that an arbitral award should not be deemed as act of authority that can be revised by federal courts. Moreover, the concept of public policy has been, for the purposes of nullification, narrowed even for arbitration of state-owned entities.

51 Third-party funding

Is third-party funding permitted in your jurisdiction?

There are no legal restrictions under Mexican Law for third-party funding, either in arbitration or litigation. To date, there have been no known cases of third-party funding in arbitration.

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Education: Escuela Libre de Derecho, Mexico City, 1996.

Associations: He is a member of the Mexican Bar Association. He is also Chair of the Committee of Infrastructure Disputes of the Mexican Chapter of the ICC.

International experience: From 1995 to date he has worked in the law firm Von Wobeser y Sierra, SC, except for 2000, when he worked as assistant to one of the counsel to the Secretariat of the International Chamber of Commerce in Paris.

He worked as a foreign associate in the area of arbitration in the firm Freshfields, Bruckhaus & Deringer (2000).

Practice areas: Mr Venegas is the founding partner of the dispute resolution (litigation and arbitration, as parties representatives) area of the firm Von Wobeser y Sierra, SC. As part of his expertise areas, he has extensive experience, not only in commercial and investment arbitration, but also in civil, commercial constitutional, administrative and intellectual property litigation, civil and commercial litigation.

Mr Venegas' experience includes the participation in the largest commercial arbitration (considering the amount claimed) in Mexican history as representative of the party who prevailed in the case. He has also pioneered in handling arbitration cases related to non-compete clauses, IP matters and commercial/administrative agreements with public entities.

In addition, Mr Venegas has participated as counsel in more than 30 arbitrations involving a wide range of areas such as commercial, trademark, construction, and franchises. He also has extensive experience in litigating before Mexican courts and acting as expert in foreign proceedings.

Publications: He participated as technical reviewer of the Spanish version of the book *The New Arbitration Rules of the International Chamber of Commerce.* He has published several articles related to arbitration and litigation subjects.

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