The Arbitration Review of the Americas 2019

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The Arbitration Review of the Americas 2019

A Global Arbitration Review Special Report

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Country chapters

Global Arbitration Review is delighted to publish *The Arbitration Review of the Americas 2019*, one of a series of special reports that deliver business-focus intelligence and analysis designed to help general counsel, arbitrators and private practitioners to avoid the pitfalls and seize the opportunities of international arbitration. Like its sister reports *The European Arbitration Review*, *The Middle Eastern and African Arbitration Review* and *The Asia-Pacific Arbitration Review* provides an unparalleled annual update – written by the experts – on key developments.

In preparing this report, **Global Arbitration Review** has worked exclusively with leading arbitrators and legal counsel. It is their wealth of experience and knowledge – enabling them not only to explain law and policy, but also to put theory into context – which makes the report of particular value to those conducting international business in the Americas today.

Global Arbitration Review would like to thank our contributors, who have made it possible to publish this timely regional report.

Although every effort has been made to provide insight into the current state of domestic and international arbitration across the Americas, international arbitration is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought.

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Mexico

Marco Tulio Venegas
Von Wobeser y Sierra SC

The formation of the 21st century legal framework for arbitration by Mexican courts

Over the past few years, Mexican courts have developed a strong body of precedents regarding arbitration. The subjects analysed and interpreted by Mexican courts have ranged from the constitutional nature of the right to arbitrate to procedural aspects of judicial intervention in support of arbitration and the interpretation of public policy in arbitrating contracts with public entities. With this jurisprudential evolution Mexico is becoming one of the most sophisticated venues for arbitration in Latin America. This feat has been accomplished by the undisputable will and guidance of the Mexican Supreme Court paired with an erudite forum of experts in international arbitration. The nature of the debate and the quality of the argumentation has facilitated the implementation of modern trends and theories of arbitration in Mexico. The executive branch has also been very active in promoting alternative dispute resolution (ADR) methods in general and putting Mexico in the forefront as one of the most active and fruitful venues for arbitration in the 21st century.

Constitutional right to arbitrate

In June 2008 a long-standing discussion about the constitutionality of arbitration was finally resolved when the Mexican constitution was amended to recognise arbitration and in general ADR as valid methods to resolve disputes. Specifically, an imperative mandate was added to include ADR in the legislation.[1] This recognition was domestically very relevant, as it effectively sent the message among the nervous judiciary that arbitration should not be seen with distrust but as a valid and helpful method to alleviate the heavy workload of state courts. More importantly, this recognition triggered academic discussions about the existence of a constitutional right to arbitrate disputes. Such right is now seen by the Mexican legal forum as a facet of the fundamental right of freedom, not only in commercial matters, but in general as the manifestation of the individuals and corporations to determine the best manner to settle their disputes without the need to necessarily resort to state courts.

Just recently an isolated precedent of the First Chamber of the Supreme Court of Justice elaborated on this change of paradigm regarding the constitutionality of arbitration. In this precedent, the First Chamber expressly mentioned that pursuant to the amendments to article 17 of the Mexican constitution 'the characterisation of the decision to access arbitration, shall be changed because instead of being a waiver of constitutional rights to (access to state courts), arbitration implies the affirmative exercise of constitutional liberties that deserve constitutional protection'.[2] The change of focus regarding the legal foundation and relevance of arbitration is undisputable. For years, the constitutional amendment arbitration was seen with suspicion and there were even some voices that deemed it an unconstitutional institution that was contrary to the fundamental right to access state justice. In the best case scenario, arbitration was an authorised exception to the access to justice (which was considered as a monopoly of the state courts). Now, arbitration is considered as an important manifestation of fundamental liberties. It is no longer an exception but an alternative to access justice with the same relevance and importance of state courts. Philosophically and practically the ramifications of this change have started to resonate in the treatment of other topics, such as arbitration with public entities and the treatment of public policy as a cause for setting aside an award. However, I anticipate that more complex and interesting theories will start to be litigated before Mexican courts that at the end will trigger a huge increase in the use of arbitration in our country.

Public policy in arbitration with public entities

In recent years several arbitration disputes involving public entities (*Petróleos Mexicanos* and *Comisión Federal de Electricidad*) raised important topics about the scope of public policy in the contracts executed with private companies, as well as to the standard of judicial review of the awards rendered in said arbitrations. The way these disputes were finally ruled by Mexican courts set an important body of precedents that provided certainty to private investments and strengthened the efficacy of commercial arbitration.

The transgression of public policy must be analysed based on the potential effects of the enforcement of the award in Mexico

In a judicial proceeding in which Petróleos Mexicanos was seeking to set aside an award related to a public work contract entered into with a foreign joint venture, the Fourth Collegiate Court set a standard and methodology for the assessment of any argument related to the breach of public policy.[3] In this case, Petróleos Mexicanos's argument was that the payment for loss of productivity established in the award breached public policy, because it was contrary to article 126 of the Mexican constitution[4] which prohibits public entities to pay any amount that is not contained in its authorised budget.

The Fourth Collegiate Court upheld the validity of the award and established that the judge should assess any breach of public policy argument not based on the merits of the award, but on the practical effects that its enforcement would have on the Mexican public policy. The Collegiate Court elaborated in this regard, that the arbitral proceeding is an 'alternative dispute resolution method', which is a modality of the human right of access to justice that should be enforced as long as due process is respected.

This interpretation of the Collegiate Court about the way a breach of public policy should be interpreted, constricts the potential setting aside of an award based on public policy arguments. Indeed, an analysis focused on the merits of an award may lead to speculative and theoretical considerations about an 'abstract' breach of public policy. The more practical approach of focusing just on the effects that an enforcement of an award, makes

it harder to set aside an award based on the ever-disputed scope of public policy arguments.

The order contained in an arbitral award to pay an indemnification resulting from a contract executed by a public entity is not contrary to the constitutional principles of public expenditure

In the same case referred in the prior section, Petróleos Mexicanos challenged the decision of the Fourth Collegiate Court before the Supreme Court of Justice through a special revision appeal.[5] The core argument of Petróleos Mexicanos's complaint was based on the alleged violation of article 134 of the Mexican constitution, which establishes the principles that govern public contracts and the expenditure of governmental entities. According to this argument when an obligation to pay a certain amount is not expressly established in the respective public contract, then a private body such as an arbitral tribunal could not impose any such obligation into a public entity in its final award. This argument would necessarily lead to an implicit immunity for all public entities, since under Mexican law the public contracts do not normally contain specific liability clauses for the public entity. However, this does not mean that the liability of the public entities for breach of contract is inexistent. It is a general principle recognised by Mexican laws that civil liability principles would apply to any public contract.

Although the Supreme Court of Justice did not formally decide the case, the draft of its decision was made public.[6] In said draft,[7] the Supreme Court of Justice upheld the interpretation made by the Fourth Collegiate Court that article 134 of the Mexican constitution obliges the public entities to act according to the principles of efficiency, economy, transparency and honesty, not only in the performance of the contract, but also afterwards in complying with the corresponding amounts established in any arbitral award. Accordingly, the obligations that could arise from the state's contractual activity must to be interpreted together with the mandatory principles set in article 134 of the constitution. Said principles procure a fulfilment of obligations and ensure private parties their right to enjoy the product of their work, as established in article 5 of the Constitution.

Pursuant to the draft of decision, the only way in which the public entity would be entitled not to respect the award would be if it were proven that the due process or fundamental rights of Petróleos Mexicanos were breached. In this case none of those circumstances were proven, thus, the principle of honesty would oblige Petróleos Mexicanos to respect and comply with the award.

The voluntary submission to arbitration by a public entity implies the granting of authority to an arbitral tribunal to interpret and rule on issues that may validly impact public policy in public contracts

The most recent precedent issued by the First Chamber of the Supreme Court of Justice in connection with the interpretation and scope of public policy in public contracts constitute a breaking point for future disputes. In a case involving the Federal Electricity Commission, the First Chamber ruled that when a public entity opts to submit a dispute to arbitration, said submission is a public policy decision. Consequently, there is an express and conscious authorisation granted to the arbitral tribunal to rule on the interpretation of the public contract that may, of course, validly impact the public policy behind said contract.

According to the First Chamber, this delegation in favour of the arbitral tribunal limits the possibility of a judicial revision or second-guessing of the merits ruled by the award with the excuse of a violation of public policy. In this regard, the First Chamber goes as far as establishing that even if it is found that the award may have breached the original design behind the public policy of the contract, said conclusion would not necessarily lead to the setting aside of the award. The main basis for this assertion is that public contracts have an exorbitant regime that entitle the public entity to terminate or amend the contracts, following the criterion of the Mexican constitution and respecting the patrimonial rights of the private contractor.

This precedent, in my opinion, evidences the high level of argumentation and analysis that the Mexican Supreme Court has reached in the definition of public policy as applied to public contracts.

Procedural topics related to judicial intervention in arbitration

Autonomy of the commercial arbitration legislation

There has been an ongoing discussion about the possibility of interpreting the procedural chapter of the Commerce Code that regulates arbitration, together with other procedural principles or provisions that are also contained in said code for other matters, or even in the Federal Code of Civil Procedures. Recently, a precedent from the Seventh Collegiate Court[8] established that the procedural chapter regulating arbitration is an 'hermetic, restrictive and self-contained' body of legal provisions that should be deemed complete and that does not require to resort in other legal provisions outside the referred chapter. In addition, this precedent also supports its vision of the arbitration chapter of the Commerce Code in the position in being a specialised legislation that inhibits the possibility of including other laws or principles in its application or interpretation.

With this precedent, the trend to consider that arbitration regulation of the Commerce Code as an independent or autonomous law has gained traction and will eventually provide certainty as to the best manner to understand and interpret the legislation in commercial arbitration in Mexico.

The computation of the deadline when challenging an award that was corrected through an addendum

Pursuant to article 1458 of the Mexican Commerce Code the complaint to set aside an award should be filed within the three months following the notification of the award, or if a request for correction has been made, since the arbitral tribunal resolved said petition.[9]

It is important to emphasise the different wording used in article 1458 to calculate the three-month deadline to file the complaint. The first scenario is clear in setting as starting point for the calculation of the three-month deadline, the date in which the award is notified to the party requesting the setting aside of the award. In the second scenario, in which a correction was made to the award, however, the wording refers to the date in which the petition to correct the award was resolved, and not to the date in which said ruling was notified.

In this context, the different wording used in article 1458 for the calculation of the three-month deadline in case of a petition of correction or clarification of an award creates under the formalism of the Mexican procedural system an awkward situation because as a matter of fact, the date in which said decision on clarification is notified, is naturally after the date of the ruling itself. Thus, there is a gap in time between the date of the ruling on clarification and the date in which it is notified.

In a recent case, the problem arose because Petróleos Mexicanos filed its complaint to set aside an award once the three months after the arbitral tribunal corrected said award had elapsed (although within the three months after said correction was notified to it). Based on the literal interpretation of article 1458 of the Commerce Code, the Eleventh District Court ex officio issued a procedural decision dismissing Petróleos Mexicanos's complaint because the statute of limitation to file it had already expired.

The above situation gave rise to several judicial decisions that established:

- a non-binding precedent on the remedies against an early dismissal of a complaint to set aside an award; and
- the interpretation of the way the deadline to file said complaint should be applied when there is a request to clarify an arbitral award.

Legal remedy against the early dismissal of the complaint to set aside an arbitral award

Faced with the early dismissal of its complaint, Petróleos Mexicanos had to determine the proper legal means to challenge said procedural order. Pursuant to Mexican procedural law any litigation proceeding starts with the filing of the complaint before the court and the subsequent issuance of a procedural order either admitting or dismissing it (even before the defendant is summoned). This procedural order can only dismiss a complaint if the revision carried out by the court of the formal requirements of the action leads it to the conclusion that the claimant failed to meet one or more of any such requirements.

Although the early dismissal of a complaint is normally subject to appeal, the Mexican Commerce Code is not clear about said possibility in proceedings dealing with the setting aside or enforcement of arbitral awards. Article 1476 of the Commerce Code mentions that neither the final ruling nor the intermediate decisions rendered in the special proceedings (dealing with setting aside of awards and its enforcement) are challengeable through ordinary appeals.[10] The reason behind this provision is that said special proceedings have a regulation intended to avoid and eliminate any type of appeal and subject the final ruling of a setting-aside action only to a potential constitutional challenge, thus, limiting the basis of the revision of said ruling.

In this case, Petróleos Mexicanos opted to follow the general principle of procedural law and filed an appeal against the early dismissal. However, the Second Unitary Court in Civil and Administrative Matters dismissed said appeal. Said court considered that under the principle of numerus clausus that rules the filing of appeals, said legal recourse is only available if the law expressly establishes that the specific decision may be subject to appeal. Therefore, since there is no explicit legal provision establishing that an appeal is admissible against the early dismissal of the complaint in a special proceeding for setting aside an award, Petróleos Mexicanos's appeal was dismissed.

The dismissal of the appeal was issued before the deadline of 15 working days (after the issuance of the early dismissal) to file a constitutional challenge (amparo) expired. Thus, Petróleos Mexicanos had the opportunity to file an *amparo* complaint in time against the early dismissal that was finally admitted and heard by the Fourth Collegiate Court. The reasons provided by the Fourth Collegiate Court to admit the *amparo* and hear Petróleos Mexicanos's argument against the early dismissal of its setting-aside complaint were mainly focused on the denial of the access of justice that would have resulted if the *amparo* was also dismissed. For Petróleos Mexicanos, the procedural order dismissing its complaint had the effect of ending the judicial process, making it impossible for Petróleos Mexicanos to pursue the annulment of the award it was seeking.

The admission of the *amparo* against the early dismissal of the setting-aside complaint set a valuable criterion for the way an early dismissal could be challenged.

Interpretation of the deadline to file a setting-aside complaint against an arbitral award when a request for clarification or correction has been submitted

Once the *amparo* was admitted, the Fourth Collegiate Court ruled on the proper interpretation of article 1458 of the Commerce Code and ordered the admission of Petróleos Mexicanos's setting aside complaint based on the following reasons.

First, the Collegiate Court considered that a setting-aside complaint could not be dismissed ex officio based on its untimeliness. The court considered that in the procedural order admitting or dismissing a complaint, the lower judge must analyse only the formal requirements (signature of the complaint, power of attorney, etc) and not the conditions in which the action was exercised, namely the statute of limitation to file it.

In addition to the above and more importantly, the Collegiate Court performed an analysis of the three-month deadline established on article 1458 of the Commerce Code. The Collegiate Court interpreted that article 1448 of the Commerce Code establishes that the need to notify an arbitral award is essential to it. Based on this requirement the Collegiate Court considered that since the addendum clarifying an arbitral award should be deemed as part of it, the obligation to notify the addendum should be extended to it. Then, based on this premise the Collegiate Court basically eliminated any distinction in the three-month deadline between the award itself and the decision clarifying it. Therefore, pursuant to this interpretation, the three-month deadline to challenge the validity of an award (including any clarification or addendum made to it) would start since the date it was notified.

The Collegiate Court also added that the three-month deadline cannot start counting before the notification of the clarification of the award, since that would force the parties to file their setting-aside action without knowing the complete content of the award (including its clarified or added portion), causing a violation of their fundamental right to access justice. This right implies not only the ability to appear before the court but to have complete certainty about the facts that may alter the way the action is exercised.

Notes

1 In this amendment, the following paragraph was added: 'the laws will provide for alternative dispute resolution methods…'.

2 'Arbitration. Normative Implications Arising from its Constitutionalization since the Amendment of June 2008'. Tenth Age, First Chamber, Judicial Weekly Gazette of the Federation. Book 40, March 2017, Volume I, Constitutional Matter, Thesis 1a. XXXVI/2017 (10a). Isolated Precedent.

3 Direct Amparo Proceeding. File No. 4/2014. Fourth Collegiate Court. Claimant Petróleos Mexicanos.

4 Article 126: No payment shall be made if it is not contained in a budget or by a determined posterior law.

5 In special circumstances, when the case has national relevance and importance, the Supreme Court of Justice has jurisdiction to hear as last instance the corresponding *amparo* proceedings.

6 Pursuant to the Amparo Act, in cases dealing with the interpretation of constitutional provisions in revision appeals, the Supreme Court

of Justice should make public the draft of decision that would be discussed in one of its sessions, before it takes place. Although this draft was never formally discussed and approved, it was the decisive factor that led Petróleos Mexicanos to settle the case.

7 Direct Amparo in revision. Docket No. 3826/2014. First Chamber of the Supreme Court of Justice.

8 'Commercial arbitration. Its Legislation is Specialized and thus, excludes General Provisions'. Ninth Age. Seventh Collegiate Court in Civil Matters in the First Circuit. Judicial Weekly Gazette of the Federation. Volume XXXII, December, 2010. Civil Matters. Thesis: 1.7o. C 150 C. Isolated Precedent.

9 'Article 1458. The application for setting aside an award must be filed within a three-month period calculated from the date of the notification of the award or, if an application has been made pursuant to articles 1450 and 1451, from the date in which said application has been resolved by the arbitral tribunal.'

10 This provision basically incorporated the principles of a prior jurisprudence issued by the First Chamber of the Supreme Court of Justice, which established that no appeal was allowed against intermediate decisions rendered in the ancillary proceeding for the recognition and enforcement of arbitral awards, that was previously regulated by article 1463 of the Commerce Code. Jurisprudence. Registration No. 171447, First Chamber, Judicial Weekly Gazette of the Federation, Volume XXVII, September 2007, Civil Matters, Thesis No. 1a/J. 105/2007, page 41.

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In 1995, Mr Venegas joined Von Wobeser y Sierra, SC where he has worked since, except for the year 2000, when he worked abroad. Mr Venegas is the youngest partner ever promoted by Von Wobeser y Sierra, SC and is currently the leading partner in dispute resolution matters at the Mexican Law Firm, Von Wobeser y Sierra, SC. In this role, he oversees and handles international commercial and investment arbitration, as well as all type of civil, commercial, administrative and constitutional litigation.

He has saved his clients billions of US dollars and has protected and resolved several of the most complex and consequential litigation and arbitration matters for multinational clients and governments around the world. His expertise includes two of the largest commercial arbitrations in Mexican history, worth more than US$1.7 billion representing the parties that prevailed in those cases. Mr Venegas also participated as counsel in the three most important arbitrations related to construction disputes involving private parties and governmental entities in Mexico. He currently serves as chairman of the Dispute Resolution Committee in Infrastructure Disputes of the Mexican Chapter of the ICC.

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