ATAVISM REJECTED: MEXICAN SUPREME COURT UPHOLDS THE CONSTITUTIONALITY OF THE MEXICAN ARBITRATION STATUTE

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I. INTRODUCTION

In 1993 Mexico adopted the UNCITRAL Model Law on International Commercial arbitration as its domestic arbitration law (the "Arbitration Law"). Since then, hundreds of arbitrations have been held in Mexico, and the number increases each year. Recently (August 2004) the Mexican Supreme Court delivered the first judgment on the Arbitration Law. This note will succinctly comment on the same.

II. THE CHALLENGE

Teléfonos de México, S.A. de C.V. ("Telmex") brought a Constitutional ("amparo") suit alleging that the Arbitration Law was unconstitutional. The Mexican Supreme Court, in a landmark case, held otherwise.

The challenge stemmed from a court resolution during an award enforcement proceeding which Telmex stood to lose.

Importantly, the Arbitration Law (Title IV, Book Fifth of the Federal Commercial Code) is inspired in the UNCITRAL Model Law on international Commercial Arbitration.

Telmex claimed that article 1435 of the Mexican arbitration statute failed to pass constitutional muster on two separate grounds:

1. The provision in question failed to accord essential procedural formalities; and
2. It granted unlimited authority.

Each shall be discussed separately.

1. Failure to include essential procedural formalities

Telmex referenced Supreme Court jurisprudence which established the due process requirements that all procedural laws must abide by in order to withstand constitutionality scrutiny. The requirements were:

a) Notice of the initiation of the proceeding and its consequences;

b) The opportunity to offer and produce the evidence involving the claims and defenses the parties may wish to rely on;

c) The opportunity to plead; and

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d) The issuance of a resolution that solves the debated issues.

Telmex alleged that Article 1435 of the Arbitration Law (an almost verbatim copy of Article 19 of the UNCITRAL Model Law), failed such constitutionality test inasmuch as it only stated:

> "Subject to the provisions of this title, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> Failing such agreement, the arbitral tribunal may, subject to the provisions of this title, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitration tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

The Supreme Court dismissed the argument. The Court found the claim to be unsupported given that Article 1435 is but part of an integral law which, if analyzed in its entirety, met the said Constitutional requirements.

2. Unbound authority

Telmex posited that the arbitration tribunal's authority to *conduct* ("*dirigir*" is the Spanish word) an arbitration procedure vested omnipotent authority on arbitrators and was hence unconstitutional.

The Supreme Court rejected the claim. In doing so it echoed the reasons for dismissing the first ground: no unbridled authority was granted inasmuch as the said proviso formed part of an integral law which contained due process limitations sufficient to conform with constitutional standards.

III. THE BREATH OF THE DECISION

As usual with important decisions, there is more than meets the eye. The decision's importance and impact deserves to be commented upon from the following angles: (1) against the Mexican legal background; and (2) the message it sends.

1. The Background

Mexican courts and attorneys are, in a sense, constitutionally-biased. By formation, the Mexican judiciary and practitioners tend to view most everything from a constitutional-lens. Should a new law or act of authority seem questionable, constitutional violations are immediately alleged and the special Constitutional remedy, the Constitutional Suit ("*Juicio de Amparo*") is brought to bear.

Arbitration was no different. Ever since the institution gained currency in Mexico, there have been those (both from the judiciary ranks as well as from the private practice fronts) who have questioned the "Constitutionality" of arbitration as a whole. As time goes by, and arbitration has become the method of choice for business, international and complex disputes,[1] the concern has lost credence. However, no authoritative

[1] González de Cossío, ARBITRAJE, Porrúa, México D.F., pgs. 1 and 567.

decision existed to back it up. The Supreme Court's ruling addresses this need—and plausibly!

2. The message beneath

In the challenge, the two *specific* claims of unconstitutionality made by Telmex were aimed at one *general* target: they amounted to due process violations.[2]

As part of the general argument the view was expressed that the broad regulation of the arbitration tribunal's authority failed to provide the parties in arbitration legal certainty as to how the procedure would be followed, and that no guarantees existed that the playing field would be leveled.

To support the concern, alleged violations of procedural technicalities in the rendering of evidence were cited which had a Mexican-court procedural-flavor.[3] This is another aspect where the Supreme Court's merit lies: not only does it uphold the constitutionality of the statute, but it specifically rejected scrutinizing the arbitration procedure as if it were a court proceeding, where the procedural-technicalities-violation argument would hold.

In doing so the Supreme Court sends the message that arbitration is a realm of its own, and that court proceeding-type chicanery is to be rejected.

IV. COMPARATIVE COMMENT

Upon reading section II of this note, foreign arbitration practitioners and academics may have the impression that the decision is insipid and that the outcome is not only obvious, but old-news. However, to avoid a premature conclusion, or one that fails to assess the context in which de ruling was made, I believe it should be weighed against the following factors. At some point or another, judiciaries of different jurisdictions have been asked to pass judgment on the validity of the flexible *modus operandi* and regulation that commercial arbitration works under. The time had not come to Mexico simply because the Arbitration Law was fairly recently enacted.[4]

When such factors are analyzed, the impact and importance becomes apparent.

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[2] Due process (called "garantía de audiencia" in the Mexican legal argot) is considered a Bill of Right ("Garantía Individual") under Article 14 of the Federal Constitution.

[3] For instance, the claim was made that evidence was produced in a manner contrary to procedural regulations. Also, that the expert witness did not prove his expertise further to the rules of procedural codes. The said acts resulted in a failure to observe due process and legal certainty rights in detriment of Telmex.

[4] The Arbitration Law was published in the Federal Daily Official Gazette on 22 July 1993. The Arbitration Law is an almost verbatim copy of the UNCITRAL Model law on International Commercial Arbitration.

V. FINAL COMMENT

It is generally said that to assess whether a jurisdiction is a good arbitration venue the following elements must be considered:

1. Whether it has a good arbitration law;
2. Whether it is part of the New York Convention;
3. Whether the domestic judiciary is arbitration-friendly.

The answers to the above questions as they pertain to Mexico are:

1. Yes, the Mexican arbitration law is the UNCITRAL Model Law;
2. Yes, Mexico has ratified not only the New York Convention,[5] but also the Panama Convention;[6] and
3. Increasingly so.

The Supreme Court decision furthers the answer to question 3. It is a step in the right direction and provides for additional grounds to support the comment increasingly heard in the arbitration milieu: Mexico is the Switzerland of Latin America.

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[5] Mexico deposited the adhesion instrument to the (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 on 14 April 1971 and published the promulgation decree on June 1971.

[6] Mexico ratified the Panama Convention of International Commercial Arbitration on 15 February 1978 and deposited it before the Secretary General of the Organization of American States on 27 March 1978. Publication in the Federal Daily Official Gazette took place on 27 April 1978.